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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

67  
STATE OF NEW YORK,

FROM AND INCLUDING A PORTION OF THE DECISIONS HANDED DOWN  
SEPTEMBER 19, 1876, TO AND INCLUDING DECISIONS OF  
DECEMBER 22, 1876.

WITH

NOTES, REFERENCES AND INDEX.

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BY H. E. SICKELS,  
STATE REPORTER.

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SANFORD E. CHURCH, CHIEF JUDGE.

WILLIAM F. ALLEN,

CHARLES J. FOLGER,

CHARLES A. RAPALLO,

CHARLES ANDREWS,

THEODORE MILLER,

ROBERT EARL,

ASSOCIATE JUDGES.



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CASES DECIDED  
IN THE  
COURT OF APPEALS  
OF THE  
STATE OF NEW YORK.

COMMENCING SEPTEMBER 19, 1876.

JAMES A. WRIGHT et al., Respondents, v. ARTHUR A. BROWN,  
Appellant.

67	1
127	213
127	336

If an order of arrest is granted in a case not authorized by the Code, or where the affidavits fail to establish one of the specified causes of arrest, the order may be reviewed in this court; but where the granting of the order depends upon the credibility of witnesses, or upon inferences to be drawn from circumstances as to which intelligent men may fairly differ, the general rule of this court is to follow the conclusions of fact of the court below.

As to whether the court has power to review the merits of the order upon the facts, *quære*.

Where a vendee purchases property upon credit, knowing that he is insolvent, without disclosing that fact, and with intent not to pay for the property, fraud may be affirmed.

The alleged ground for an order of arrest was fraud on the part of defendant, in contracting a debt for the purchase-price of 6,000 bushels of malt. The affidavits disclosed that defendant was a brewer; he gave his notes for the malt at two, three and four months. Defendant was, at the time, indebted to his wife about \$75,000, and to others about \$55,000, a portion of which was in suit and liable at any time to go into judgment. His property was all personal, worth about \$20,000. The notes were given January eighth; on the fourteenth he borrowed of his brother \$9,000, giving a chattel mortgage on all his property, except the malt so purchased; on the fifteenth, he borrowed of another person \$4,500, on 5,000 bushels of the malt; on the eighteenth,

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## Statement of case.

he sold all his property, except the malt, to his wife; subject to the mortgage, the purchase-price being applied upon his indebtedness to her; and on February eighth he sold to her the malt, subject to the loan, the balance being applied in the same manner, and stopped business. Defendant's affidavit set forth facts tending to explain these circumstances, and alleged that he intended to continue in business and to pay for the malt when he purchased. No false representations were claimed to have been made by him, and no act or device was resorted to, to deceive plaintiff. Defendant was solicited to purchase, and urged to increase the amount beyond what he desired to purchase. *Held* (CHURCH, Ch. J., EARL and ANDREWS, JJ., dissenting), that upon the case made by plaintiff the inference was legitimate that defendant must have known when he purchased the malt, that he could not continue in business and pay for it, and hence was chargeable with an intent not to pay; that to what extent such case was impaired by the averments and explanations of defendant, depended partly upon the force to be given to the facts and the inferences to be drawn therefrom, and the conclusion of the court below, adverse to defendant, was justifiable, and so conclusive here.

(Argued June 18, 1876; decided September 19, 1876.)

APPEAL from order of General Term of the Supreme Court in the second judicial department, affirming an order of Special Term denying a motion to vacate an order of arrest.

It appeared by plaintiffs' affidavit, that about December 23, 1874, defendant contracted, through a broker, to purchase of plaintiffs 6,000 bushels of malt for \$7,920.57, upon credit, except \$476 for storage and charges. The malt was billed to defendant, December 31, 1874, and on January 8, 1875, defendant gave his notes for the purchase-price less the sum so paid in cash, at two, three and four months. The order of arrest was applied for and granted on the ground of fraud in said purchase. The facts upon which the charge of fraud was based, and the substance of the opposing affidavit of defendant, are set forth in the opinion.

*Robt. Johnstone* for the appellant. If defendant knew that he was insolvent and intentionally concealed this fact, his silence was not a fraud upon plaintiffs. (*Mitchell v. Warden*, 20 Barb., 253; *Nichols v. Pinner*, 18 N. Y., 295; *Brown v.*

## Statement of case.

*Montgomery*, 20 id., 293; *Hennequinn v. Naylor*, 24 id., 139; *Chaffee v. Fort*, 2 Lans., 87; *Fisher v. Conant*, 3 E. D. S., 199; 2 Pars. on Cont. [4th ed.], 270.) Fraud must be proved affirmatively. (18 N. Y., 300; *Wakeman v. Dalley*, 51 id., 27, 31; *Marsh v. Falker*, 40 id., 666; *Hathaway v. Johnson*, 55 id., 95; *Sturges v. Cunningshield*, 4 Wheat., 200; *Van Hoffman v. City of Quincy*, 4 Wal., 553; *Clafin v. Frank*, 8 Abb. Pr., 412.) To sustain an order of arrest plaintiffs must show an intention to defraud existing in the mind of the purchaser at the time of the purchase. (55 N. Y., 93; *Burchell v. Strauss*, 8 Abb. Pr., 57; *Spies v. Jael*, 1 Duer, 163; *People v. Kelly*, 35 Barb., 444.) If a clear case of fraud has not been proved, the order of arrest will not be sustained. (*Un. Bk. v. Mott*, 6 Abb. Pr., 315; *Chapin v. Seeley*, 13 How. Pr., 490; *Hernandez v. Comobete*, 10 id., 449; *Corwin v. Freeland*, 6 N. Y., 565; *Falconer v. Elias*, 3 Sandf., 731.) The fact that defendant sold out to his wife is no evidence of fraud in this case. (*Fairbanks v. Mathersell*, 41 How. Pr., 274; *Sheldon v. Clancy*, 42 id., 186; *Savage v. O'Neil*, 44 N. Y., 298; *Vanderbilt v. Gould*, 39 id., 639; *McCartney v. Welsh*, 44 Barb., 271; *Wordsworth v. Sweet*, id., 268; *Danforth v. Woods*, 11 Paige, 9.) An appeal will lie to the Court of Appeals from the order of General Term denying motion to discharge defendant from arrest. (55 N. Y., 93; 34 id., 555; 25 id., 501; *Tracy v. First Nat. Bk. of Selma*, 37 id., 523; *Townsend v. Hendricks*, 40 How., 143; Code, § 11, sub. 4; *Guin v. Tompkins*, 1 Code R. [N. S.], ; *Wright v. Rowland*, 4 Keyes, 165; 36 How., 115; Laws 1847, chap. 280, § 8; 2 R. S., 167, § 27; Laws 1854, chap. 270, § 1.)

*Winchester Britton* for the respondents. The purchase of goods by an insolvent, concealing the fact of insolvency, with the existing intent not to pay for them, is a fraud upon the vendor, though no affirmative representations are made by the vendee. (*Nichols v. Michael*, 23 N. Y., 264-273; *Hennequinn v. Naylor*, 24 id., 139; *Devoe v. Brandt*, 53 id., 462.) This court could not review on appeal the affidavits on which



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Opinion of the Court, per *Curiam*.

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the order of arrest was granted to determine the preponderance upon conflicting allegations. (*Hathaway v. Johnson*, 55 N. Y., 93.)

*Per Curiam.* This is an appeal from an order affirming an order denying a motion to vacate an order of arrest. It is competent for this court to review such an order if it involves a question of law, as when the order of arrest was granted in a case not authorized by the Code, or when the affidavits fail to establish one of the specified causes of arrest. If the party applying for the order fails to establish a proper case, the order should be denied, and if granted, it is the legal right of the party to have it rescinded, and if refused, an appeal will lie to this court. But when it depends upon the credibility of witnesses, or upon inferences to be drawn from circumstances in respect to which intelligent men may fairly differ, the general rule is in this court to follow the conclusion of fact arrived at by the court below.

The alleged ground for the order of arrest is that the defendant was guilty of fraud in contracting the debt for the malt, and the question to be decided below was, and in this court is, whether the fraud was sufficiently established. It is not claimed that the defendant made any representations or statements concerning his financial situation or pecuniary means, and it is well settled that a mere failure to disclose insolvency, although known to the purchaser at the time, is not regarded as fraudulent so as to affect the title to the property purchased, or render the purchaser amenable to an order of arrest. (18 N. Y., 295.) "If he makes no false statement, and resorts to no acts or contrivances for the purpose of misleading the vendor, it is not, I think, a fraud, to say nothing on the subject." (Id., per SELDEN, J., 20 N. Y., 293; 20 Barb., 253; 2 Lans., 87.) But if there is a condition of known insolvency undisclosed, and an existing intention on the part of the purchaser not to pay for the property, it has been held that fraud may be affirmed. (23 N. Y., 264; 24 id., 139-153; id., 462.) That the defendant was insolvent at

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Opinion of the Court, per *Curiam*.

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the time he purchased the malt, that is, that his obligations were much larger than his assets, and that he did not disclose such insolvency, is not disputed, and the plaintiffs charge that he then knew that he could not pay, and intended not to pay for the malt. The principal facts relied upon to establish such intent, are these: The defendant was a brewer, engaged in the manufacture of ale. He contracted for the malt through a broker, about the 23d of December, 1874, a bill of the same was made the 31st of December, and notes given on the 8th of January, 1875, and the malt was delivered between those dates. He was indebted at the time to his wife about \$75,000, and to other persons about \$55,000, of which latter sum about \$15,000 was in suit, and liable at any time to go into judgment and execution. His property consisted of material and personal property in and about the brewery worth about \$20,000. On the 14th of January, 1875, he borrowed \$9,000 of his brother and gave him a chattel mortgage on all the personal property, except the malt purchased of the plaintiffs; on the next day (the fourteenth) he borrowed, upon 5,000 bushels of said malt, \$4,500 from an outside party, and on the 18th of January, 1875, he sold all his property in and about the brewery, except said malt, to his wife for about \$20,000, subject to the mortgage which she assumed, and the balance of the purchase-money was applied upon the defendant's indebtedness to her; and subsequently, on the eighth day of February, he sold to his wife the 5,000 bushels of malt subject to the loan of \$4,500, the balance, about \$1,100, was paid by applying it upon her debt. The malt sold amounted to \$7,920.57, and except \$476 in cash, was sold on a credit of two and four months. Upon these facts it is claimed that the defendant must have known at the time of the purchase that he was unable to continue the business or to pay for the malt, and could not have intended to pay for it; and that this is confirmed by his stopping business immediately afterwards, and transferring all his property to his wife, including the property purchased of the plaintiffs.

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There were two motions to vacate the order of arrest, the first having been denied with leave to renew, and the defendant, by way of explanation, alleges that at the time he purchased the malt he was solicited to purchase by the broker, that he intended to purchase only 2,000 bushels at first, but after urgent solicitations he consented to increase the amount to 6,000; that he purchased it in the usual way for use in his brewery, and that he then expected to continue the business and pay for the barley; that he expected to defend the action for \$12,000 successfully, and believed that he would do so until the eleventh of January, when he examined the evidence taken by commission in England, and until that time he supposed that he had due him \$19,000 from his English firm, and that although disappointed as to both items he still believed that the loan from his brother of \$9,000, and the loan of \$4,500 on the malt, would enable him to continue business; that he had lost a handsome fortune in three years, partly in commercial ventures and in aiding his son, and partly in building up the brewery business, which he had increased from a business of 9,000 to 25,000 barrels, and that the business was then prosperous, and that during the previous year he had paid his obligations at maturity and had paid out over \$200,000; and he assigns as a reason for transferring his property, his continued illness, which became so severe that he was unable to attend to his business, and was then disheartened and discouraged. Upon the case made by the plaintiffs the inference is legitimate that the defendant must have known when he purchased the barley that he could not continue in business, and that he could not pay for it, and hence that he is chargeable with an intent not to pay for it; and this is confirmed by the close connection of events and by finally transferring all his property to his wife, including the malt so recently purchased of the plaintiffs. To what extent the denial and explanation of the defendant should be deemed to impair the case made by the plaintiffs, depends partly upon the force to be given to, and inferences drawn from, the facts, the most important of which are undisputed. From the whole case both the Special

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and General Terms draw conclusions adverse to the defendant, and we cannot say that they were not justified by the facts, judging the defendant by the ordinary motives which influence men in the conduct of pecuniary affairs, and, therefore, within the general rule referred to, the decision of the court below should be deemed conclusive upon this court. To weigh testimony, pass upon the credibility of witnesses, and draw inferences, is in general not the province of this court in reviewing orders of the Supreme Court. As was said in the *People v. The Superior Court of New York*, "there is no standard by which the weight of conflicting evidence can be ascertained. Different courts and juries and individuals would entertain different opinions upon the subject." The determination of such questions is, in some sense, discretionary, and for that reason orders upon motions for new trials, upon the ground that verdicts are against the weight of evidence, are not appealable. (*Id.* ; 26 Wend., 143 ; 53 N. Y., 325.) But without passing upon the abstract question of power, it follows from the views expressed that the order must be affirmed.

CHURCH, Ch. J. (dissenting). Assuming that this court has the power to review the merits of the order upon the facts, as I think it has, after a careful examination of all the facts, I am not satisfied that the defendant at the time he purchased the malt had an existing intention not to pay for it.

When no representations are made, and no acts or devices resorted to, to deceive the vendor, the circumstances should point with great clearness to a want of good faith, to justify a finding of a corrupt intent. In this case it is conceded, that no representations, acts or devices were resorted to, and, in addition to this, it appears that the defendant was solicited to purchase the property, and urged to increase the amount beyond what he at first desired to purchase. It also appears that the property was purchased upon the usual terms, and was needed for use in the defendant's brewery, and although the quantity was somewhat large it was not an unusual quan-

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tity to purchase, and from the fact that it would stock the brewery but two months, we can see that it was not an improper quantity to purchase. The circumstances attending the sale do not furnish any evidence of bad faith, and they go far in repelling any suspicion of an improper intent.

It is said that his pecuniary condition was so embarrassing that he must have known that he could not continue in business, and could not pay for the barley. To my mind the facts fall far short of establishing this conclusion. The debt to his wife of about \$75,000, was considerably more than to all others, and so long as he continued in business, we may presume that he had no fear of interference from her. Of his other debts amounting in all to about \$55,000, it is true, that two of them, one for \$12,000, and one of \$3,000, had been sued and defences had been put in, and one of about \$1,800 was about being sued. As to the balance it does not appear that he was crowded, nor but that he could meet them at maturity. The action for \$12,000 was in demands incurred by an English firm, of which he had been a member, and if his evidence is to be believed, he supposed until the eleventh of January, after the purchase, that he had a good defence. The defence in substance was that the action was prosecuted by a nominal plaintiff, but really for the benefit of his former partner in England, and that such partner was indebted to him in the sum of \$19,000, and the defendant says, that not until the eleventh of January, when he examined the evidence taken on commission in England, did he ascertain that his defence could not be sustained, and also that his demand for \$19,000 was not then available. And he also states that notwithstanding this disappointment, he believed he could still continue in business, and on the fourteenth he borrowed \$9,000 of his brother, and \$4,500 upon 5,000 bushels of the malt purchased which he used in his business, but that his illness became so severe that he was unable to do business and became discouraged, and on the eighteenth sold out.

If these statements are true, and they are neither incredi-

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ble nor improbable, the allegation that he must have known that he could not continue in business when he purchased the malt, which was about the twenty-third of December, has very little foundation. A prosperous business of \$200,000 for the past year, the obligations incident to which to that amount had been promptly met, would not, ordinarily, be closed by a judgment of \$3,000, nor even by judgments of \$15,000. It would not require an over sanguine man to attempt to overcome such an amount of pressing demands, so, that aside from the supposed alleged defence to \$12,000, it is very far from clear that the defendant did not believe, on the twenty-third of December that he would be able to weather the storm. Many a business man has bridged over a worse situation than that with a business apparently so prosperous. The proximity of events, the purchase of the malt, and the failure and final selling out is a circumstance entitled to consideration upon the point, but it is not conclusive nor inconsistent with a purchase in good faith. Every failure has its accumulation of embarrassments and its final culmination, but the explanation of the defendant is not unreasonable; he may have struggled on in the belief that he could go through; and the increasing illness which incapacitated him from doing business, may have rendered the failure inevitable. In *Nichols v. Pinner* (18 N. Y., 295) PRATT, J., held, that upon a question of fraudulent purchase, in April, the fact that the purchaser made an assignment of all his property for the benefit of creditors, in August, did not tend to prove that he did not intend to pay for the property purchased; and, although the case was decided upon another point, there was no dissent from this position. In this case the intervening time was nearly a month, and the fact is far from being decisive under the circumstances developed. A person embarrassed often struggles along in the hope of being able to continue business, under very adverse circumstances, and if he finally fails it would be a harsh judgment to attribute to him, during this period of uncertainty and perhaps delusive hope, a fraudulent intent in transacting his business and in buying

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and selling in the ordinary way. Nor is the circumstance that the sale of the personal property was made to the wife, and the consideration applied upon her debt, decisive. The continuance of the business was important to its success. A temporary suspension would have been fatal, without benefiting any one; the price paid by the wife for the property was its full value; nothing appears to impeach her position as a *bona fide* creditor. While her husband was doing business she was, doubtless, a lenient creditor, but she had the same legal right to purchase this property as any other creditor. A wife, as a *bona fide* creditor of her husband, occupies the same legal position as any other creditor. In this case she owned the real estate and purchased the personal property, subject to the mortgage of \$9,000, and the affidavits state, paid its full value, and more than any one else would pay for it. The fact that the sale was made to the wife instead of another, is of slight moment upon the question of original fraudulent intent. As to the sale of 5,000 bushels of the malt purchased to the wife, the sale was not made until the eighth of February, and then was made subject to the loan upon it of \$4,500, leaving only \$1,100 purchase-money. As a matter of equity, considering the recent purchase, this balance of \$1,100 might have been paid to the plaintiffs. The defendant might have done this; and, as it was the avails of the identical property purchased, perhaps a nice sense of honor would have caused this application of it. But the question is not whether the actual disposition made was the most just or equitable, but what should be its effect in establishing an original fraudulent intent. It was a legal sale and is not controlling upon the point. The fact is as consistent with innocence as guilt in the original purchase. On the whole, I think the plaintiff failed to establish so clear a case of fraudulent intent in purchasing the property as the law requires, especially in a case where no representations were made, and no acts or devices resorted to by the defendant, and when the property was not purchased until after repeated and urgent solicitation, and was needed in the prosecution of defendant's business. The

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defendant may have been over sanguine and too hopeful, and may have indulged in delusive expectations. In the language of PRATT, J., in 18 New York (*supra*), "This is an every-day experience in the commercial world, and it would be hard, indeed, if the unfortunate victim of hopes, that looked to him at the time as reasonable, must, in his misfortunes, be judged by the actual instead of the possible results." It is a circumstance in the defendant's favor, not conclusive, but competent to be considered, that he and his wife, his son, who was conversant with the business, and his book-keeper, testify that, at the time this malt was purchased, the defendant expected to go on with business, and they believed that he could do so successfully, and could pay for the malt and all other obligations, and the broker who sold the malt states that he believes the defendant made the purchase in good faith, intending to pay for it.

The order of the General and Special Term should be reversed, and the motion to vacate the order of arrest granted.

All concur for affirmance, except CHURCH, Ch. J., ANDREWS and EARL, JJ., dissenting.

Order affirmed.

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THOMAS E. FAIRFAX, Appellant, v. THE NEW YORK CENTRAL  
AND HUDSON RIVER RAILROAD COMPANY, Respondent.

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Plaintiff purchased a ticket at Montreal of the G. T. R. Co. to New York, and had his portmanteau checked through. In an action to recover the value thereof and of its contents, it appeared that it was received by defendant, transported to New York, and there deposited in its baggage-room. When plaintiff demanded it it could not be found, and no account was given of the cause of the disappearance. *Held*, that, without regard to the question whether defendant became liable as common carrier, it incurred at least the responsibility of a warehouseman; that this evidence made out a *prima facie* case of negligence; and that, therefore, a direction to the jury to render a verdict for defendant was error. *Fairfax v. New York Central Railroad Company* (5 J. & S., 516) reversed.

(Argued June 18, 1876; decided September 19, 1876.)



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APPEAL from judgment of the General Term of the Superior Court of the City of New York, affirming a judgment in favor of defendant entered upon a verdict. (Reported below, 5 J. & S., 516.)

This action was brought to recover the value of a portmanteau and contents, alleged to have been received by defendant to be transported to New York.

Plaintiff purchased a ticket at Montreal of the Grand Trunk Railway Company, from that city to New York, and had his baggage, including the portmanteau in question, checked through. The portmanteau, with the other baggage, was received by the defendant at Troy; was carried through to New York and deposited in its baggage-room, where it was seen by the man in charge for two days thereafter. Upon the third day plaintiff called for his baggage; he found and received the other pieces, but the portmanteau was missing, and no account could be given of the cause of the disappearance. It did not appear that there had been any burglary or larceny, or that any other baggage was missing. The court directed a verdict for defendant on the grounds that defendant did not occupy the position of common carrier in regard to plaintiff and his baggage; that the baggage was carried to New York and was ready for delivery; plaintiff failed to call for it in a reasonable time, and it subsequently disappeared, without negligence on defendant's part; to which, plaintiff's counsel duly excepted. A verdict was rendered accordingly. Further facts appear in the opinion.

*Albert Stickney* for the appellant. Defendant, whether negligent or not, was liable absolutely for a conversion. (*Robinson v. Baker*, 5 Cush., 137; *Fitch v. Newberry*, 1 Dong. [Mich.], 1.) If the baggage was delivered to defendant without plaintiff's knowledge or authority, he could ratify that delivery by bringing this action. (2 Greenl. Ev., § 210; *Sanderson v. Certon*, 6 Binn., 129.) The special agreement made with the agent when the baggage was delivered can be proved. (*Quimby v. Vanderbilt*, 17 N. Y., 306; *Van Bus-*

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*kirk v. Roberts*, 31 id., 661.) The first carrier of goods, in a line of successive carriers, is the implied agent of the line, and his contract will bind them, whether made known to them or not. (2 Redf. on R. R. Cas., 218.) The fact that plaintiff did not travel with his baggage is immaterial. (*The Elvira Harbeck*, 2 Blatch., 366; *Jordan v. Fall River R. R. Co.*, 5 Cush., 69.) The question whether plaintiff sent for the baggage in reasonable time was one of fact. (*Rus. Man. Co. v. N. H. Stbt. Co.*, 50 N. Y., 121; *Curtis v. Avon, etc. R. R. Co.*, 49 Barb., 149; *Gillooly v. N. Y. and S. Co.*, 1 Daly, 197.) Plaintiff was entitled to go to the jury on the question of gross negligence. (*Steers v. N. Y. and L. St. Co.*, 57 N. Y., 1.) The question whether the misdelivery of the baggage was made by defendant's negligence was one of fact. (*Lutbock v. Inglis*, 1 Stark., 104; *Price v. Oswego R. R. Co.*, 50 N. Y., 213; *Hall v. B. and W. R. R. Co.*, 14 Al., 439.) Defendant would be liable for the tort of its servant. (*Higgins v. Watervliet Co.*, 46 N. Y., 23; Story on Agency, §§ 400, 406, 452.) The answers of the person in charge of the baggage room, of the superintendent, of the agent and of the person who took charge of baggage for defendant under a contract with them, were admissible. (*McCormick v. Penn. R. R. Co.*, 49 N. Y., 316.) Plaintiff was a competent witness as to the value of the lost articles. (3 Edm. Stat., § 37, p. 635.)

*Frank Loomis* for the respondent. The relation of carrier to a passenger and his baggage did not exist between plaintiff and defendant. (Ang. on Car., §§ 107, 110; 2 Redf. on Railways [4th ed.], 39; Laws 1850, chap. 140, § 28, sub. 9; *Glasco v. N. Y. C. R. R. Co.*, 36 Barb., 557; *Jones v. Nor. and N. Y. Tr. Co.*, 50 id., 193; *Collins v. B. and Me. R. R. Co.*, 10 Cush., 506; *Maghee v. C. and A. R. R. Co.*, 45 N. Y., 524; 5 J. & S., 516.) Defendant fully discharged its duty as carrier of passengers and their baggage. (2 Redf. on Railways [4th ed.], 40; *Ouimit v. Henshaw*, 35 Vt., 605; *Holdridge v. U. and B. R. R. Co.*, 56 Barb., 191; *Roth v.*

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*B. and S. L. R. R. Co.*, 34 N. Y., 548; *Burnell v. N. Y. C. R. R. Co.*, 45 id., 184.) Plaintiff, intending to stop over, had no right to have his baggage checked through. (*Hedges v. H. R. R. R. Co.*, 49 N. Y., 223.) Any arrangement between the Grand Trunk Railway and defendant did not constitute, as between plaintiff and defendant, the relation of carrier to the passenger and his baggage. (*Northrop v. Syr. and B. R. R. Co.*, 5 Abb. [N. S.], 425; *Fenner v. B. and S. L. R. R. Co.*, 44 N. Y., 505; *Colman v. Livingston*, 4 J. & S., 32; 56 N. Y., 658.)

RAPALLO, J. We think this judgment must be reversed upon the ground that it clearly appears that the portmanteau was taken in charge by the defendant and transported to New York, and there deposited by it in its baggage-room. The defendant thus incurred the responsibility of a warehouseman, at least, without regard to the question which has been argued whether it became liable as a common carrier. When the plaintiff demanded the article it had disappeared, and no account is given of the cause of such disappearance. This is *prima facie* evidence of negligence. (*Steers v. Liv., N. Y. and P. Sts. Co.*, 57 N. Y., 1.) The facts proved show that the loss was quite as likely to have arisen from a misdelivery as from theft. There was no evidence that there had been any burglary or larceny in the room, or that any other baggage was missing. It is true that the person in charge of the baggage-room testifies that although he personally made all the deliveries he did not deliver this portmanteau to any one; still, if he delivered it by mistake, it is quite possible that he would have no recollection of having done so; and the facts testified to by him, if he is accurate in his statements, show that it is scarcely possible that the portmanteau could have got out of the room without his having delivered it.

Upon this evidence the question of negligence was one of fact which should have been submitted to the jury, as requested by the plaintiff's counsel. The proof of the general care, with which the baggage-room and its contents were guarded, was

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not sufficient to establish conclusively that there was no want of care in this particular instance. (*Burnell v. The N. Y. Cen. R. R. Co.*, 45 N. Y., 184.)

The judgment must be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

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OWEN TULLY, Plaintiff in Error, v. THE PEOPLE OF THE STATE  
OF NEW YORK, Defendants in Error.

In an indictment for mayhem, premeditated design must be averred; but it is not necessary to state the manner in which the premeditated design was evinced. The circumstances establishing premeditation are matters of evidence and to be proved on the trial.

The distinction between the statute of this State and the English statute defining the offence pointed out.

In an indictment upon a statute it is unnecessary that the words of the statute should be precisely followed, but words of equivalent import or more extensive signification, and which necessarily include the words used, may be substituted.

An indictment for mayhem charged that the accused did "cut, bite, slit and destroy" the thumb of the prosecutor. The offence proved was that the thumb was disabled. The indictment was claimed to be defective, in that it did not allege that the thumb was "disabled" in accordance with the statutory definition of the offence. (2 R. S., 665, § 27.) *Held*, that the word "destroy" was a more comprehensive word than "disable," and includes what is signified by it, and that therefore the indictment was not defective by reason of the substitution.

(Argued June 14, 1876; decided September 19, 1876.)

ERROR to the General Term of the Supreme Court, in the second judicial department, to review judgment affirming judgment of the Court of Oyer and Terminer of the county of Kings, convicting plaintiff in error of the crime of mayhem.

The indictment charged that the plaintiff in error "in and upon one Walter Westlake, in the peace of God and of the people of the State, then and there being, willfully and felo-

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niously and with premeditated design, did make an assault, and that the said Owen Tully with the teeth of him, the thumb of him, the said Walter Westlake, then and there willfully and feloniously and from premeditated design, did cut, bite, slit and destroy on purpose, with intent, then and there and thereby, in manner aforesaid, the said Walter Westlake then and there to maim and disfigure, against the form of the statute in such case made and provided," etc.

The evidence tended to show that the prosecutor, Westlake, was riding in a street-car; the accused got into the car, but not paying his fare when called on, was put off by the conductor; he got on again and forced his way into the car, exclaiming as he did so, "Let me in till I eat somebody." After getting in he caught hold of the conductor and bit his thumb. Westlake requesting him to be quiet, as there were ladies in the car, they both sat down. After a few moments the accused sprang up and struck Westlake, and as the latter arose, seized his nose with his teeth; Westlake put up his hand to protect his face, when the accused caught his thumb in his mouth and began to chew it, and continued so to do until he was forced from the car by the other passengers, hanging on to the thumb until he reached the platform. Westlake's thumb was stiffened and permanently disabled.

The counsel for plaintiff in error requested the court to charge the following propositions:

First. "Under the indictment in this case, the defendant cannot be convicted of mayhem, in cutting off or disabling the thumb of the complainant.

Second. "The indictment does not allege that the thumb was cut off or disabled.

Third. "The allegation in the indictment that the thumb was destroyed, is disproved by the evidence, the thumb still being perfect on the hand of the defendant, whether disabled or not.

Fourth. "There is no evidence, in the case, of premeditated intent, such as is called for by the statute defining the crime of mayhem.

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Fifth. "The premeditated attempt required by the statute, must be evinced by lying in wait, or some similar means, and no such evidence has been offered in the case.

Sixth. "The indictment in this case is not sufficient as an indictment for mayhem, and is only good as an indictment for assault and battery."

The court declined to charge specifically, as requested, stating as to the first three propositions that the word "destroy," as used in the indictment, necessarily included the word "disabled," and that proof that the thumb was disabled answered the averment, and was sufficient to sustain the indictment; to which the plaintiff in error, by his counsel, duly excepted.

*Wm. F. Howe* for the plaintiff in error. The indictment was insufficient. It should have followed the precise words of the statute. (3 Just., 118; 3 Chit. Cr. Law, 786; *Hawkins*, b. 2, c. 23, § 79; *Republic v. Ricker*, 3 Yeates, 282; 2 Bish. on Cr. Proc., §§ 856, 857; 1 East P. C., 402; *Comm. v. Lester*, 2 Va. Cas., 198; *Freeman v. People*, 4 Den., 9, 29; *People v. Butler*, 16 J. R., 203; *Comm. v. Humphries*, 7 Mass., 180; *Dedieu v. People*, 22 N. Y., 180; 2 Bish. Cr. Law [3d ed.], § 176; 1 Kent's Com., 464; *People v. Goshen Tpke. Co.*, 11 Wend., 596; *People v. Mather*, 4 id., 229; *People v. Wilber*, 4 Park. Cr., 19; *People v. Allen*, 5 Den., 76; *Wood v. People*, 9 Barb., 671; *Briggs v. People*, 8 id., 547; *People v. Enoch*, 13 Wend., 172, 173; *Wood v. People*, 53 N. Y., 51; Hale's Pleas of Crown, 628; Foster's Cr. Law, 423; 1 Rus. on Crimes, 686; Barb. Cr. Law, 73, 332; *Enright v. People*, 21 How. Pr., 383; *People v. Davis*, 18 id., 134; *O'Leary v. People*, 4 Park. Cr., 187; *Fellinger v. People*, 15 Abb. Pr., 128; 24 How. Pr., 341.) The defects in the indictment could not be supplied by evidence or cured by a verdict. (*Ruloff v. People*, 18 N. Y., 180; *People v. Davis*, 18 How. Pr., 134.)

*Thomas S. Moore* for the defendants in error. The indictment was sufficient to sustain a conviction for mayhem. (2 Stat. at L., § 27; 2 R. S., 664; *Lehman v. People*, 1 N. Y.,

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383; *Dawson v. People*, 25 id., 399; *Rex v. Jones*, 2 B. & Ad., 611; *Dedieu v. People*, 22 N. Y., 183; *Sanchez v. People*, id., 149; *People v. Powers*, 6 id., 50; *People v. Stockham*, 1 Park., 454; *Fraser v. People*, 54 Barb., 306; *Briggs v. People*, 8 id., 546; *Thomson v. People*, 3 Park. Cr., 208; *Godfrey v. People*, 5 Hun, 376.)

ANDREWS, J. The offence of mayhem is defined by the statute as follows: "Every person who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony, shall (1) cut out or disable the tongue; or (2) put out an eye; or (3) slit the lip or destroy the nose; or (4) cut off or disable any limb or member of another on purpose, on conviction thereof, shall be imprisoned, etc." (2 R. S., 665, § 27.)

The prisoner was convicted under this statute for disabling the thumb of the prosecutor by biting. The parties at the time of the injury were in a street car in Brooklyn. The prisoner caught the thumb of the prosecutor between his teeth, and held it there for some moments, meanwhile biting through and separating the joint, thereby permanently stiffening and disabling it. The indictment charges that the prisoner (Tully) "with force and arms in and upon one Walter Westlake, willfully and feloniously, and with premeditated design did make an assault, and that the said Owen Tully with the teeth of him, the thumb of him the said Walter Westlake, then and there willfully and feloniously, and with premeditated design, did cut, bite, slit, and destroy on purpose, with intent, etc., to maim, and disfigure," etc.

It is insisted that the indictment is defective in not averring the manner in which the premeditated design was evinced. This was unnecessary. The offence is complete whenever a person having formed a design to maim another, proceeds to, and does execute it. The jury must find as a fact, before there can be a conviction, that there was a premeditated design to maim, and it must be averred in the indictment. But the manner in which this design was evinced, and the circumstances

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establishing it are matters of evidence to be proved on the trial. The issuable fact on this branch of the case is whether the particular injury was deliberately and intentionally committed. The conduct of the accused before and at the time of the transaction, the preparation made, and his lying in wait, his threats and declarations tending to show his intention in making the assault, with many other facts and circumstances which might be suggested, may be given in evidence upon the issue of premeditation, but it would be improper, and often impracticable, to spread them out in the indictment. The learned counsel for the prisoner in insisting upon this point, has been misled by a supposed analogy, in indictments under our statute, and under the statute 22 and 23 Caroline II, chapter 1. That statute is, "that if any person shall on purpose, and of malice aforethought, by lying in wait," etc., do any of the acts specified, he shall be guilty of mayhem. It was held, that an indictment under this statute must aver a lying in wait (3 Chitty Cr. Law, 786), and for the reason manifestly that without the averment, no crime under the statute would be charged. It made the maiming of another an offence only when there was premeditation evinced in a particular manner, viz., "by lying in wait." The reason for the decision under the English statute has no application to indictments under our statute. The intention of our statute was to enlarge the definition of the offence, and to include within it all cases of designed and premeditated maiming, and the words "or in any other manner," were inserted for that purpose.

The indictment is also claimed to be defective for the reason that it does not allege that the prosecutor's thumb was "disabled." The fourth specification of the statute is, "or shall cut off or disable any limb or member," and the indictment charges that the prisoner did "cut, bite, slit and destroy," the thumb of the prosecutor. It is a well-settled rule of criminal pleading that an indictment upon a statute must state all the facts and circumstances which constitute the statutory offence, but it is not necessary that the words of the statute should be precisely followed. Words of equivalent import may be sub-



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stituted, or words of more extensive signification, and which necessarily include the words used in the statute. The decisions are by no means uniform on the subject, and elsewhere great particularity has been required in framing indictments upon statutes, and in some cases it has been held that the precise language of the statute must be used. But the rule in this State is in conformity with the more liberal doctrine above stated. (*People v. Enoch*, 13 Wend., 172; *People v. Holbrook*, 13 J. R., 90; *People v. Rynders*, 12 Wend., 427; *Fraser v. People*, 54 Barb., 306; *People v. Thompson*, 3 Park., 208; see also Wharton's Crim. Law, vol. 1, § 376; *Rex v. Fuller*, 1 B. & P., 180; *State v. Little*, 1 Vt., 534; *State v. Hickman*, 8 Halsted, 299; *United States v. Bachelder*, 2 Gall., 15; *State v. Keen*, 34 Me., 500.) The word "destroy" used in the indictment is more comprehensive than the word "disable," and includes what is signified by it, and the indictment is not defective by reason of the substitution.

We are also of opinion that the evidence warranted the submission to the jury of the question whether the prisoner, by premeditated design, inflicted the injury complained of. It is quite clear that there may be a maiming, resulting from an unlawful assault which could not be punished under the statute in question. The maiming must be the result of premeditation and design, and it has been recently decided in this court in *Godfrey v. The People* (63 N. Y., 207), that the design must precede the conflict, and not originate with, and grow out of it. But in general the question whether there was premeditation will be one of fact for the jury, and not of law for the court. There are circumstances, we think, in this case from which the jury might have inferred that during the interval between the time the prosecutor first addressed the prisoner and the time when the prisoner commenced the affray, a space of several minutes, he formed the intention to inflict the injury which followed. The case is not without evidence bearing upon that question, and it was carefully submitted to the jury with instructions upon the law, quite as favorable to the prisoner as he was entitled to.

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We think there was no error in any of the rulings on the trial, and that the judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

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JOHN H. WHITMORE, Respondent, v. THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

The provision of the act of 1878 reorganizing the local government of the city of New York (§ 97, chap. 335, Laws of 1873), which authorizes the board of apportionment to fix the salaries of all officers paid from the city treasury, includes only city officers; *i. e.*, such as are connected with the political organization of the city government.

Clerks of the district courts of the city are not such officers, but judicial officers embraced within the judiciary system of the State.

Accordingly *held*, that a resolution of the board of apportionment fixing the salaries of such clerks was inoperative, and that they were entitled to the salaries given them by the act of 1872, relating to courts in the city and county of New York. (§ 1, chap. 438, Laws of 1872.)

(Argued June 15, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on a verdict. (Reported below, 5 Hun, 195.)

This action was brought to recover a balance of salary alleged to be due plaintiff as clerk of the district court of the city of New York for the third judicial district.

The salary of such clerk is fixed by chapter 438 of the Laws of 1872, at \$3,000 per annum.

The board of estimate and apportionment of the city and county of New York, under and pursuant to section 97 of chapter 335 of the Laws of 1873, passed a resolution fixing the salary of plaintiff and other similar officers at \$2,500 per annum. At that rate plaintiff has been paid, and he brought

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Opinion of the Court, per *Curiam*.

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this action to recover the difference between that sum and \$3,000, for the period covered by his complaint.

The court directed a verdict for the amount claimed, which was rendered accordingly. Exceptions were ordered to be heard, at first instance, at General Term.

*D. J. Dean* for the appellant. Plaintiff was an officer within the meaning of section 97 of chapter 335, Laws of 1873. (*Collins v. Mayor, etc.*, 3 Hun, 681; *Sullivan v. Mayor, etc.*, 47 How. Pr., 491.)

*James W. Fowler* for the respondent. Section 97 of chapter 335, Laws of 1873, does not refer to plaintiff, and included only officers forming part of the political organization of the city government. (*Quinn v. Mayor, etc.*, 44 How. Pr., 266; 53 N. Y., 627; *Day v. Buffington*, 11 Int. Rev. Rec., 205; 11 Wal., 113; *Freedman v. Sigel*, 10 Blatch., 327; *London v. Mayor, etc.*, 7 J. & S., 467.)

*Per Curiam*. We are of the opinion that the act, chapter 335 of the Laws of 1873, authorizing the board of apportionment to fix the salaries of all officers paid from the city treasury, does not include any but city officers, such as are connected with political organization of the city government. The act is entitled "An act to reorganize the local government of the city of New York."

The plaintiff is not such an officer, but is a judicial officer, embraced within the judiciary system of the State. (*Quinn v. Mayor, etc.*, 44 How. Pr., 266; affirmed in this court, 53 N. Y., 627; *London v. Mayor, etc.*, 7 J. & S., 467.)

If the legislature intended to embrace other than strictly city officers, it must be presumed that the statute would have so declared in express terms. The constitutional question need not be considered.

The judgment should be affirmed.

All concur; FOLGER, J., absent.

Judgment affirmed.

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Statement of case.

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JOHN LESTER WALLACK, Appellant, v. THE SOCIETY FOR THE REFORMATION OF JUVENILE DELINQUENTS IN THE CITY OF NEW YORK, Respondent.

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The court will not sustain an action to restrain a prosecution to recover a penalty imposed by statute, on the ground of the invalidity of the statute, at least until its invalidity has been determined in a previous action.

Nor can an action to restrain such prosecution be sustained as a bill of peace, where the plaintiff brings it in his own behalf, and not also in behalf of others claiming the same right.

So, also, a court of equity will not issue an injunction restraining defendant from applying to such court for equitable relief in the same matter; especially where such relief is expressly authorized by a statute, the validity of which has not been judicially questioned.

Accordingly *held*, that even assuming the unconstitutionality of the act of 1872, "regulating places of amusement in the city of New York" (chap. 836, Laws of 1872), plaintiff, a theatrical manager, could not maintain an action to restrain defendant, "The Society for the Reformation of Juvenile Delinquents," etc., from suing for the penalty imposed by said act upon any person exhibiting a dramatic exhibition without a license, or from enjoining such an exhibition.

(Argued June 16, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendant, entered upon an order sustaining a demurrer to plaintiff's complaint.

The complaint alleged in substance, that plaintiff was engaged in the business of conducting and managing a place of public amusement in the city of New York, known as Wallack's theatre, where public dramatic performances were exhibited. That under and by color of the provisions of chapter 836 of the Laws of this State, passed in the year 1872 (which provisions plaintiff averred were illegal, void, and unconstitutional), the defendant, "The Society for the Reformation of Juvenile Delinquents" pretends and claims that plaintiff, before managing and conducting said place of amusement, on and after the 1st day of May, 1874, shall apply for and

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Statement of case.

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receive from the mayor of the city of New York (as and for the act of the other defendant, the mayor, aldermen, and commonalty of the city of New York) a license, as required by said act, and under penalty after refusal or neglect to take out said license and pay said fee, of being sued by said society to recover \$100 for each dramatic performance in plaintiff's said place of public amusement, and that the said defendant threatens the legal proceedings against plaintiff mentioned in section 8 of said chapter 836 of the Laws of 1872, to restrain and prevent the exercise of plaintiff's business, and is about immediately to institute legal proceedings unless the license aforesaid be applied for and obtained. That to sue plaintiff for the penalties aforesaid, and to shut up by legal proceedings plaintiff's place of amusement aforesaid for one or several nights or times, would greatly and irremediably injure the goodwill and present profits of plaintiff's said private business and place of amusement aforesaid, and cause him great damage.

Plaintiff asked judgment, "perpetually enjoining and restraining the defendants, and each of them, and their and each of their attorneys, agents, and servants from beginning or prosecuting against the plaintiff any of the proceedings which are provided by any of the sections of chapter 836 of the Laws of 1872 of this State, hereinabove referred to, and restraining them from enforcing or imposing, or attempting to enforce or impose, any penalty or penalties against the plaintiff under or by color of any of the provisions of said chapter, by suit or otherwise, and from applying for any injunction to restrain the plaintiff from conducting or carrying on the said business and place of amusement for performances as hereinabove mentioned, and that, meantime and during the pendency of this action, the defendants be enjoined and restrained in manner aforesaid, by the order of this court."

*A. Oakley Hall* for the appellant. Coercing fees for a license by the State upon a business is a process convertible with that of taxation. (*License Tax Cases*, 5 Wal., 462.) This right can only be used for an object which is within the

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purpose for which governments are established. (*Loan Assn. v. Topeka*, 20 Wal., 656; *Calder v. Bull*, 3 Dallas, 388; *Street v. Hurlburt*, 51 Barb., 318; *N. Y. Passenger Cases*, 7 How. [U. S.], 523; *Cooley v. Port Wardens*, 12 id., 313; *Speer v. School Directors*, 50 Penn., 150; *Com'l Bk. v. City of Iola*, 2 Dil., 359.) If a tax is not for a public purpose, although it passes through the hands of a public officer, it is unconstitutional. (*Sharpless v. Mayor, etc.*, 21 Penn., 169; 2 Hoff. Laws., 164-171.) The remedy of action for an injunction was proper. (*Wood v. Brooklyn*, 14 Barb., 425; *Sweet v. Hurlburt*, 51 id., 319.)

*Edmund Randolph Robinson* for the respondent. There was no equity to warrant an injunction. (*McGuire v. Palmer*, 5 Rob., 607; *Bean v. Pettengill*, 2 Abb. Pr. [N. S.], 59; *Seeback v. McDonald*, 11 Abb. Pr., 95; *Wolfe v. Burke*, 56 N. Y., 115; *Snedeker v. Pearson*, 2 Barb. Ch., 107; *N. Y. Dry Dock Company v. Am. Trust Co.*, 11 Paige, 384; Story's Eq. Jur., § 825; *West v. Mayor, etc.*, 10 Paige, 539; *Fire Dept. Cases*, 3 E. D. S., 440.) Chapter 836, Laws of 1872, is constitutional. (3 E. D. S., 440, 453, 460; 6 T. & C., 310; 2 R. S. [4th ed.], §§ 8, 11; Const., art. 4, § 2, sub. 1; *People ex rel. Har. R. R. Co. v. Mayor, etc.*, 47 How. Pr., 494; *Met. Bd. of Excise v. Barrie*, 34 N. Y., 668.) The act is valid, even if the use be private. (1 Kent's Com., 441 *Grant v. Courter*, 24 Barb., 232; *Cochran v. Van Surlay*, 20 Wend., 381; *Guilford v. Suprs.*, 3 Kern., 144; *Wynehamer v. People*, id., 378, 430, 453, 476, 477; *Township of Pine Grove v. Talcott*, 19 Wal., 666; *People v. Flagg*, 46 N. Y., 404; *Thomas v. Leland*, 24 Wend., 65; *People v. Mayor*, 4 N. Y., 420; *Brewster v. Syracuse*, 19 id., 116; *In re Trustees N. Y. P. E. School*, 31 id., 582, 583; *Darlington v. Mayor, etc.*, id., 190; *Howell v. Buffalo*, 37 id., 267; *Litchfield v. Vernon*, 41 id., 123; *People v. Lawrence*, id., 137; *Guilford v. Suprs.*, 3 Kern., 143; *State v. Tappen*, 29 Wis., 664; *McCulloch v. Maryland*, 4 Wheat., 428; *Prov. Bk. v. Billings*, 4 Pet., 563.) The use is public. (*Sharpless v.*

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*Mayor, etc.*, 21 Penn. St., 147; *Spier v. School Directors*, 50 Penn., 150, 160; 59 Me., 517; *Brodhead v. City of Milwaukee*, 19 Wis., 652; *Booth v. Woodbury*, 32 Conn., 128; *Curtis v. Whipple*, 24 Wis., 355; *Olcott v. Suprs.*, 16 Wal., 667, 678; *Town of Queensbury v. Culver*, 19 id., 83, 666, 676, 677; *Lowell v. Oliver*, 8 Al., 247; *Freeland v. Hastings*, 10 id., 571; *Helbish v. Catterman*, 64 Penn., 154; *Merrick v. Amherst*, 12 Al., 500; 58 Me., 590; *Allen v. Jay*, 60 id., 124; *Bank v. Iola*, 2 Dil., 353; *Citizens' Svgs. Assn. v. Topeka*, 11 Alb. L. J., 172; *Thompson v. Pittston*, 59 Me., 545; *Tyson v. School Directors*, 51 Penn., 9; *Kelly v. Marshall*, 69 Penn. St., 319; *Lowell v. Boston*, 111 Mass., 454; *People v. Salem*, 20 Mich., 452; *Hanson v. Vernon*, 27 Iowa, 28; *Whiting v. Sheboygan*, 25 Wis., 167; *Sweet v. Hurlbert*, 51 Barb., 516; *People v. Mitchell*, 35 N. Y., 551; *Clark v. Rochester*, 28 id., 605; *Gould v. Venice*, 29 Barb., 442; *Walker v. Cincinnati*, 21 Ohio [N. S.], 14; *Cooley's Const. Lim.*, 164, 168, n; 27 Iowa, 81.) The legislature can constitutionally tax or impose license fees upon any trade, profession or business carried on in the State and enforce payment by penalties, or by prohibiting the exercise thereof until the tax or license is paid. (*Prov. Bk. v. Billings*, 4 Pet., 514; *License Tax Cases*, 5 Wal., 462, 475; *Svgs. Bk. Cases*, 6 id., 611; *Nathan v. Louisiana*, 8 How. [U. S.], 73; *State v. Waples*, 12 La. An., 343; *State v. Fellowes*, id., 344; *Egan v. County Court*, 3 Har. & McH., 169; *Simmons v. State*, 12 Mo., 268; *State v. Gazlay*, 5 Ham. [Ohio], 14; *Lent's Case*, 6 Greenl., 412; *Durack's Appeal*, 62 Penn. St., 491; *Ingersoll v. Skinner*, 1 Den., 540; *People v. Coleman*, 4 Cal., 46; *Raquet v. Wade*, 4 Ham., 107; *State v. Stephens*, 4 Tex., 137; 9 id., 369; *The Germania v. State*, 7 Md., 1; *Boston v. Schaffer*, 9 Pick., 415; *City of New Orleans v. North*, 12 La. An., 205; *Rowland v. Kleber*, 1 Pittsb., 68; *Fire Dept. v. Noble*, 3 E. D. S., 452; *Ingersoll v. Skinner*, 1 Den., 540; *People v. Lawrence*, 41 N. Y., 137.) The act was valid as a police regulation. (34 N. Y., 657; 5 How. [U. S.], 589; 12 id., 299; *State v. Almond*, 2 Houst. [Del.],

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612; *Com. v. Stodder*, 2 Cush., 562; *Nightingale's Case*, 11 Pick., 168; *Village of Buffalo v. Webster*, 10 Wend., 99; *Bush v. Seabury*, 8 J. R., 418; *Slaughter-house Cases*, 16 Wal., 62; *Comm. v. Cotton*, 8 Gray, 488; *Tanner v. Albion*, 5 Hill, 121.)

ANDREWS, J. The act, chapter 836 of the Laws of 1872, entitled "An act to regulate places of amusement in the city of New York," makes it unlawful to exhibit to the public in any place within the city, a dramatic or other exhibition mentioned in the act, until a license therefor shall have been obtained from the mayor, who is authorized to grant such license on the payment of a specified fee. The act directs that license fees received by the mayor under the act shall be paid over by him to the treasurer of the defendant, The Society for the Reformation of Juvenile Delinquents, in the city of New York, for the use of the society. (§§ 4, 5.)

The second section subjects a person offending against the act to a penalty for each unlicensed exhibition, and authorizes the defendant to sue for and recover the penalty for the use of the society, in the name of the people. The eighth section provides that, in case any person shall open, or advertise to open, any theater or other place for any exhibition for which, by the act, a license is required, without having first obtained it, it shall be lawful for the society to apply to the Supreme Court, or any justice thereof, for an injunction to restrain the opening thereof until he shall have complied with the requisitions of the act in obtaining a license, which injunction the section declares may be allowed upon a complaint in the name of the society, and in the same manner as injunctions are now usually allowed by the practice of the court.

The plaintiff is the manager of a theater in the city of New York, in which dramatic representations are given, for which, under the act, a license is required. He alleges in his complaint that the act of 1872 is unconstitutional, and that the defendant threatens to take legal proceedings under the eighth section to restrain him from prosecuting his business, and is about to institute them, unless he obtains the license required



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by the act. He avers that to sue him for penalties, and to shut up by legal proceedings his place of amusement for one or several times, would greatly and irremediably injure the good will and present profits of his business, and cause him great damage. The relief demanded is that a perpetual injunction issue, restraining the defendant from beginning or prosecuting against the defendant any suit for penalties given by the act, or from applying for an injunction under the eighth section. It is not expressly alleged that the plaintiff is conducting the theater without having obtained a license, but this is implied in the allegations made, and unless the fact is assumed, the plaintiff has no standing in court. The ground upon which the unconstitutionality of the act of 1872 is claimed, is not set out in the complaint, but was stated upon the argument to be, that the license fee required to be paid is, in substance, a tax imposed upon the persons engaged in giving the public exhibitions mentioned in the act, for the benefit of The Society for the Reformation of Juvenile Delinquents, a private corporation, and for a private and not a public purpose, and that the law imposing it is an unauthorized exercise by the legislature of the power of taxation.

We are not at liberty to enter into the consideration of the general question of the validity of the legislation in question. We are precluded from doing so by the objection taken *in limine* by the defendant, and which is fatal to the plaintiff's action, that assuming the unconstitutionality of the act of 1872, the plaintiff is not, upon the facts stated in the complaint, entitled to an injunction. The general rule is that the court will not restrain a prosecution at law, when the question is the same at law and in equity. (*Wolfe v. Burke*, 56 N. Y., 118.) An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the Chancellor in *West v. The Mayor* (10 Paige, 539) dissolved a temporary injunction restraining the defendant from prosecuting suits against the

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complainant for violation of a corporation ordinance claimed to be invalid.

The unconstitutionality of the act of 1872 would be a perfect defence to a prosecution for the penalties given by it, and the question as to the constitutionality of the act has not been determined. It would, doubtless, be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not a ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage, rather than restrain, litigation. Nor can the prosecution for the penalties be restrained in this action, on the ground that it is a suit in the nature of a bill of peace. The plaintiff does not bring it in behalf of himself and others claiming the same right. It does not appear that the validity of the law is questioned by any other person. The judgment in the action would only bind the parties to it. (*Eldredge v. Hill*, 2 J. Ch., 281.)

The plaintiff also asks for an injunction restraining the defendant from applying for an injunction under the eighth section of the act. The case of *Wolfe v. Burke* (*supra*) is a decisive answer to this part of the prayer of the complaint. The act expressly gives the right to the defendant to make the application. If for any reason an injunction ought not to be granted on such an application, it can not be assumed that it would be. It would be an anomaly for a court of equity to issue an injunction restraining the defendant from applying to the same court for equitable relief in the same matter, and especially when it is authorized by the express terms of a statute, the validity of which has not been judicially questioned.

We do not wish to be understood as expressing any doubt of the validity of the law of 1872. We simply leave that question undetermined, and dispose of the case on the question here considered.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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WILLIAM C. TRAPHAGEN, Respondent, v. JOHN BURT et al.,  
Appellants.

Plaintiff and defendant entered into a verbal agreement to purchase and improve real estate on joint account, sharing equally the profits and losses. Under this arrangement two farms were purchased, which were conveyed to the parties jointly. A third farm was contracted for by their agent in his own name, but defendant, without the knowledge or consent of plaintiff, procured an assignment of the contract and a conveyance of the farm to himself. The parties made permanent improvements from time to time at their joint expense upon, and purchased cattle and other property for, all and each of the farms. All three were treated alike, and plaintiff, with the knowledge of defendant, directed about work and improvements upon the last one purchased and made payments therefor, he and defendant visiting it together, talking in reference to disposing of the personal property thereon and of an interest therein, without any intimation on the part of defendant that plaintiff was not a joint owner with him. Plaintiff advanced money from time to time on account of all the purchases without distinction. In an action to compel defendant to convey an undivided interest in said farm to plaintiff, *held*, that the agreement was not within the statute of frauds, but was valid as forming a partnership for the purchase of lands; that the farm in question was included in the agreement, and the defendant, having taken title in fraud of plaintiff's right, a resulting trust arose in favor of the latter; that it was not necessary for plaintiff to resort to an action to dissolve the partnership and for an accounting, but that plaintiff was entitled to the relief sought. After discovery by plaintiff of the fact that the farm was conveyed to defendant, the parties entered into an agreement that plaintiff should convey to defendant his interest in one of the other farms, and in the personal property thereon, defendant agreeing, among other things, to convey to plaintiff an undivided one-half interest in the farm in question. The agreement was fully executed save in respect to such conveyance, which defendant refused to execute. *Held*, that aside from the question of the copartnership, plaintiff was entitled to and could enforce a specific performance in this particular.

*Levy v. Brush* (45 N. Y., 589) distinguished.

(Argued June 16, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, affirming

a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts are sufficiently set forth in the opinion.

*Samuel Hand* for the appellant. The parol agreement under which plaintiff claimed to have a trust declared in the land of defendants, was void under the statute of frauds. (2 R. S., 134, §§ 6, 8; *Levy v. Brush*, 45 N. Y., 589, 596; *Smith v. Burnham*, 3 Sumn., 435; Story's Eq. Jur., §§ 760-762, 763; *Caggar v. Lansing*, 43 N. Y., 550; *Baldwin v. Palmer*, 10 id., 232; *Carr v. Carr*, 52 id., 260; *Chester v. Deckerson*, 54 id., 8; *Freeman v. Freeman*, 43 id., 34; *Lobdell v. Lobdell*, 36 id., 347; *Haight v. Child*, 34 Barb., 186; *Crosby v. McDaul*, 3 Ves., 147.)

*Charles Matthews* for the respondent. The farm in question was partnership property, and a resulting trust could be established by parol in plaintiff's favor. (*Chester v. Dickinson*, 54 N. Y., 1; *Buchan v. Sumner*, 2 Barb. Ch., 165, 197, 207; *Buckley v. Buckley*, 11 Barb., 44; *Delmonico v. Gil-laume*, 2 Sandf. Ch., 336; *Hoxie v. Carr*, 1 Sumn., 173; *Boyers v. Elliott*, 7 Humph., 204; *Boyd v. McClear*, 1 J. Ch., 582; *Botsford v. Barr*, 2 id., 405; 2 Story's Eq. Jur., 617; Perry on Trusts, §§ 132-134, 137; *Swinburne v. Swinburne*, 28 N. Y., 568; *Foote v. Bryant*, 47 id., 544.)

MILLER, J. This action was brought to establish the right of the plaintiff to an undivided equal interest in a farm of land called the Storms farm, the title to which was in the name of the defendant John Burt. The right of the plaintiff to maintain the action rests upon the ground that the farm in question was purchased by the defendant under an oral agreement between him and the plaintiff to engage in the business of buying and selling farms, and it is claimed that in violation of this contract, the title was taken by the defendant. It appears that two other farms were purchased under the agree-

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Opinion of the Court, per MILLER, J.

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ment in question, as well as some personal property, the title acquired in the name of the plaintiff and defendant, and the business conducted and the real estate and personal property held as co-partnership property. As to the farm in question, the judge found, with sufficient evidence to support such finding, that the defendant, without the consent or knowledge of the plaintiff, procured a deed of conveyance of the farm to be executed to himself, and has since held legal title to the same under said deed. It was also found by the judge, upon the trial, that from time to time after said farms were purchased and conveyed, the plaintiff and the defendant, at their joint expense, made permanent improvements on each of said three farms, including the farm in controversy, and expended a considerable sum of money in so doing; and also purchased, on joint account, cattle, and other personal property, and put same on said farms under the agreement which had previously been made. That the plaintiff was ignorant of the fact that the title was in the defendant for some time, and he and the defendant talked about and treated the farm as their joint property, the plaintiff, with the knowledge of the defendant, personally giving directions about work and improvements thereon, and making payments therefor.

Whatever criticism may be made as to the evidence, and the weight to be given to the same, as an original question, it cannot be denied that there was considerable evidence to support the findings last referred to. If the testimony produced by the plaintiff is to be believed, the declarations, acts and conduct of the parties were of a character which warranted the conclusion that the plaintiff and defendant both considered the farm as joint property. There was proof showing that they visited the farm together; gave directions about repairs thereon; talked about the disposition of personal property upon it; and the defendant spoke of the farm frequently as a purchase made by himself and the plaintiff. There was also proof that when another party desired to become interested in the farm, and the subject was discussed, the defendant did not give the slightest intimation that the plaintiff was not a joint

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owner, but assumed that he was such. Although the improvements claimed to have been made upon this farm were not very extensive, and of themselves perhaps not sufficient to establish a right in the defendant to his share of the real estate, yet in connection with other testimony they tended to establish that the defendant and plaintiff both understood that the property was held by them jointly, and was embraced within the terms of the copartnership agreement.

In support of the fact that the farm was the joint property of the parties, it is also found upon sufficient evidence that in the spring of 1871, after the plaintiff had discovered that the title of the Storms farm was in the defendant, he proposed to the defendant that if he, the defendant, would make the plaintiff's interest in one of the farms owned in common under the copartnership contract, and the farm in question clear, and would protect the plaintiff against certain trust-moneys which the defendant had used in making such purchases and other liabilities on their joint account, and execute a mortgage to the plaintiff for \$5,000 on the Goble farm, so called, which was owned by the plaintiff and defendant, that the plaintiff would deed said Goble farm to the defendant, and transfer to him his interest in certain personal property. This proposition was accepted, the deed delivered and property transferred, and mortgage executed, but the defendant refused to release to the plaintiff an undivided interest in the Storms farm. No such arrangement could ever have been made if the plaintiff had no interest in the Storms farm under the copartnership contract; and the conclusion is irresistible, from the facts presented, that this farm actually belonged to the plaintiff and the defendant, as joint owners under the parol agreement for a copartnership, which was executed, unless there is some inflexible rule of law which stands in the way of enforcing such an agreement. It is established, by abundant authority in this State, that a partnership may exist in reference to the purchase, sale and ownership of lands, and that it may be created by a parol agreement. (*Chester v. Dickerson*, 54 N.Y., 1.) In reference to the farms which were

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conveyed to the plaintiff and the defendant, jointly, there can be no doubt that there was a legal, valid and subsisting partnership which bound the parties, and which the law recognizes. As to the Storms farm, it was as the findings establish, considered, used and treated in the same manner as the other two farms. The moneys advanced by the plaintiff were paid on account of the three farms together, without separating them or applying any payment upon any particular one. The negotiations which led to the conveyance by the plaintiff of his interest in the Goble farm embraced the partnership, real estate and the three farms, which were regarded as belonging to the parties. In fact, the contract was carried into effect, accepted and acquiesced in as an executed agreement, as an entirety, and as embracing all the real estate and personal property which the parties owned in common, and which had been purchased for their joint benefit. Possession being thus had, and improvements made and moneys advanced for the common benefit and for all the property, and the interest of the plaintiff in this farm especially, settled for and adjusted by the conveyance to the defendant of the Goble farm, it is difficult to see why the rule of law applicable to an executed agreement does not apply. Concede that neither one of the facts, stated, alone and of itself, establishes a valid contract, yet all, taken in connection with the circumstances, may be considered as making out a valid and binding executed contract.

But there is another element which is to be taken into consideration : Under the agreement between the plaintiff and defendant, the contract for the purchase of land was to be made with an agent, and then transferred by him to the parties ; and, in violation of this arrangement, the contract for the Storms farm was assigned to the defendant, and a deed taken in his name, of which the plaintiff was for a long time ignorant. This, in law, under the facts proved, was a fraud upon the plaintiff. Being such, under the circumstances presented by the evidence, the deed cannot be regarded as conclusive, and the claim of the appellant's counsel that the agreement

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Opinion of the Court, per MILLER, J.

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being by parol for the purchase of lands for the joint benefit of the parties, was within the statute of frauds, cannot be maintained. We are referred, by the learned counsel for the appellant, to the case of *Levy v. Bush* (45 N. Y., 589) as an authority for the doctrine that such an agreement is void under the statute. (2 R. S., 134, §§ 6, 8.) In the case cited there was a verbal agreement entered into between the plaintiff and defendant, by which the latter agreed to bid off in his own name and enter into a contract for the purchase of land, and pay from his own funds the necessary amount for the joint benefit of both, half of which was to be reimbursed and a deed taken in the name of both. It was held that the defendant having bid off the land in his name and taken a contract thereof, and refused to convey one-half to the plaintiff, no action would lie to compel the execution of the agreement. In the case cited the plaintiff had done no act of performance, advanced no money, nor parted with any thing under the contract, nor had the land been accepted, possessed and treated as joint property, nor improvements made upon the same accordingly, and the contract regarded as carried into effect. In the particulars stated there is a broad distinction between the two cases, and the case cited is not, therefore, in point. Where a party has partly performed, or parted with valuable property upon the faith of the contract, equity will not allow another party to retain property obtained upon the faith of a verbal contract to consummate a fraud by retaining the property and refusing to perform the contract. The case at bar is brought within this equitable rule which is also distinctly upheld in the case cited, and none of the cases hold that where the circumstances proven mark and characterize the transaction, that the injured party has no remedy.

It must be assumed, from the findings, that the Storms farm was purchased on joint account of the plaintiff and defendant; considered as a portion of their real estate; moneys advanced by the plaintiff on account of the same and other property, and finally, in consideration of, and as a payment for the plaintiff's interest, a conveyance executed to the



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Statement of case.

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defendant, of his interest in another farm. The plaintiff thus actually paid and settled for his share of the farm and was entitled to an undivided half thereof as a resulting trust. (*Boyd v. McClean*, 1 J. Ch., 582; *Botsford v. Bann*, 2 id., 405.)

There is no force in the objection urged that the action should have been for a dissolution of the firm and an accounting, and it was properly brought to compel a conveyance of the undivided interest of the Storms farm to the plaintiff. There was no error in allowing the plaintiff to amend the complaint after the decision, nor such change thereby in the cause of action as impaired or affected the defendant's rights. At most, the order granted was merely conforming the pleadings to the facts proved, which was clearly within the discretionary power of the court, and could work no injury. The ruling of the judge upon the question put to the witness, excluded upon the trial, even if erroneous, does not effect the merits to such an extent as to authorize a new trial.

The judgment below was right, and should be affirmed, with costs.

All concur.

Judgment affirmed.

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ANDREW M. WAIT, Respondent, v. GEORGE W. RAY, as Sole Trustee, etc., Appellant.

The power given to school district trustees to contract with and employ teachers (chap. 555, Laws of 1864) is not limited to an employment during the trustees' term of office; but a contract with a teacher for a period extending beyond their term, if made in good faith, without fraud or collusion, and for a reasonable period, is valid and binding upon their successors.

(Argued June 19, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of defendant, entered upon an order denying a motion for a

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Opinion of the Court, per EARL, J.

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new trial and directing judgment upon a verdict. (Mem. of decision below, 5 Hun, 649.)

This action was brought to recover damages for an alleged breach of a contract, under and by which plaintiff was employed to teach the district school in District No. 3, of the town of Norwich, Chenango county. The facts sufficiently appear in the opinion.

*George W. Ray* for the appellant. The trustee of a school district has no authority to hire a teacher for a term to commence after his term of office has expired, and bind his successors in office or the district. (*Taylor v. School Com. No. 17*, 5 Jones' Law, 98; 2 R. S. [Banks' ed.], 131, § 210; *Dillon on Munic. Corps.*, 32, 33; *School Code* [1868], p. 400; *Williams v. Keech*, 4 Hill, 168; 23 Barb., 176; 7 Wend., 188; 8 Foster [N. H.], 58; 11 Mass., 198.)

*Isaac S. Newton* for the respondent. The contract of the trustee was binding upon the district and his successors in office. (7 Wend., 181; 4 Hill, 168; *Gillis v. Space*, 63 Barb., 177; *Laws* 1864, chap. 555, § 48, sub. 9; *School Code* [1868], 127, §§ 30, 32; *Williams v. Vil. of Dunkirk*, 3 Lans., 51; *N. Y. and N. H. R. R. Co. v. Schuyler*, 34 N. Y., 49, 50; *Feeny v. Fire Ins. Co.*, 2 Robt., 60; *Wilt v. Mayor, etc.*, 5 id., 259.)

EARL, J. In October, 1871, Ransom C. Cox was elected sole trustee of the school district, and his term of office expired on the second Tuesday of October, 1872. In March of the latter year, he made an agreement with the plaintiff, hiring him to teach the district school for three terms, as follows: First term, of fourteen weeks, to commence March twenty-seventh; second term, of fourteen weeks, to commence August nineteenth, and the last term, of sixteen weeks, to commence in December. There was to be a short vacation after each term, and plaintiff was to receive sixteen dollars per week. Plaintiff taught the first two terms and was paid for them, the last

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 REPORT OF THE COURT, PER EARL, J.
 

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... meeting November twenty-third. At the annual ... on the second Tuesday of October, 1872, W. H. ... elected trustee of the district, and he held office ... thereafter, when the defendant, Ray, was appointed ... The trustee, Sternberg, refused to permit the ... the third term, and employed a new teacher ... school, and this action is brought by the plaintiff to ... damages sustained by him for the breach of the ... with him by the trustee, Cox.

The main ground upon which this action is defended is, ... the trustee, Cox, had no authority to hire a teacher for a ... extending beyond his term of office, and this contention ... the defendant presents the principal question for our ... consideration.

School districts are *quasi* corporations, and trustees are officers of them, and when they act officially and within their jurisdiction they bind the corporation which they represent, and their legal contracts can be enforced against their successors in office. (*Silver v. Cummings*, 7 Wend., 182; *Williams v. Keech*, 4 Hill, 168.) Trustees have power "to contract with and employ all teachers in the district school or schools." (Laws of 1864, chap. 555, p. 1253.) This power is general and unlimited. If it had been intended that the contracts which they are authorized to make should not extend beyond their term of office, this general language would have been limited. The school year commences with the first day of October and ends with the thirtieth day of September in each year (Laws of 1858, chap. 151, § 1); and the term of office of a sole trustee is one year, extending from the annual meeting on the second Tuesday of October to the next annual meeting on the same day. (Laws of 1864, chap. 555, pp. 1241, 1247.) It would certainly be found quite embarrassing frequently if no one had the power, prior to the second Tuesday of October, to employ a teacher for the remainder of the fall and winter, and to have the school brought to a stop at that unusual time. The office of trustee may become vacant by death, refusal to serve, incapacity, removal from the district

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Opinion of the Court, per EARL, J.

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or removal from office, and his term of office may thus be curtailed. And it would be a strange construction of the statute which would terminate the teacher's contract with every such termination of the trustee's office. The power to employ teachers is, therefore, very wisely made general; and a contract for one year or more, if made in good faith, and without fraudulent collusion, must be held binding. This power, like every other power confided to public officers, may be abused, but the fact that it may be abused furnishes no argument against its existence. The danger of abuse is, however, very small, as a hiring for an unusual time would be strong evidence of fraud and collusion; and if a teacher, under such circumstances, should persist in teaching against the protest of the district, the State superintendent might find cause to annul his certificate, and thus terminate his employment. (Laws of 1864, chap. 555, p. 1215.)

The contention of the defendant would be more plausible if there were a general rule that public officers could make contracts to continue only during their terms of office, but there is no such general rule; and as to officers who have general powers to contract, unless there is some limitation of their power, their contracts may extend beyond their terms, and bind their successors. The public exigencies demand that public officers should be clothed with such power, and protection against its abuse is found in official integrity, which is the rule rather than the exception, and also in the fact that contracts, the offspring of fraud or collusion, may be safely repudiated.

The view thus taken of the statute is sanctioned by the opinion of a learned court in *Fillis v. Space* (63 Barb., 179).

We have carefully examined the other exceptions to which our attention has been called, and it is sufficient to say of them that they are not well taken.

The judgment should be affirmed, with costs.

All concur, except CHURCH, Ch. J., dissenting; ANDREWS, J., absent.

Judgment affirmed.

## Statement of case.

DANIEL W. WHITNEY et al., Appellants, v. RANDOLPH W. TOWNSEND, Respondent.

Where a judgment has been affirmed by the General Term, with costs, an entry of judgment without including costs is regular; the respondent may waive costs, and, by entering up judgment upon the order of affirmance without inserting them, he does waive them.

The docketing of a judgment is only necessary to create a lien upon lands. Under the statutory requirement, that judgments shall be entered in a "judgment book," separate books are not required for the entry of judgments in legal and equitable actions.

Where separate books are kept, a departure from the usual practice of the office by an entry of a judgment in one book which properly belongs in the other, may be disregarded, or the error corrected by the court, in its discretion, and its action is not reviewable here.

So an order denying a motion to set aside a judgment, because of failure to file a proper judgment roll, is not reviewable here; if what was done amounts to a legal nullity, no substantial rights of defendant are impaired by the denial; if the roll is not in due form, or the filing, for any reason, is irregular, the granting or refusing the application is discretionary.

(Argued June 20, 1876; decided September 19, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, affirming an order of Special Term denying a motion to vacate and set aside a judgment and judgment roll, and to cancel of record any entry of such judgment. (Mem. of decision below, 7 Hun, 233.)

This action was brought to have a deed declared to be an equitable mortgage, and for an accounting, redemption, etc. Judgment was rendered and perfected in favor of defendant. Plaintiffs appealed to the General Term, where the judgment was affirmed December 30, 1869. On the 9th November, 1872, a judgment roll was filed by defendant, containing the printed case, a copy of order of General Term, and the following judgment or *postea*: "On reading and filing the annexed order of the General Term of this court, and on motion of R. W. Townsend, Esq., defendant and respondent in person, it is ordered and adjudged that the judgment entered in this action

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Statement of case.

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on the 24th day of October, 1869, in favor of the said defendant and respondent, against the plaintiffs and appellants, be and the same hereby is in all things affirmed."

In the office of the clerk of the city and county of New York are kept two books for the entry of judgments, one styled the "common-law judgment book," in charge of a law clerk, the other the equity judgment book, in charge of the equity clerk. The indorsement of filing upon the judgment roll was by the law clerk, and in the common-law judgment book, after title of cause, was this entry: "Judgment of affirmance on appeal for resp'dt agst. applts." No other entry or record of the judgment was made.

The motion to set aside the judgment was made upon the following grounds:

"That the said pretended judgment was irregularly and improperly entered; that the said pretended judgment roll was irregularly and improperly filed.

"First. Because said pretended judgment was not entered as directed by the order of the General Term of this court on which it was based.

"Second. Because said pretended judgment was not properly entered in the proper judgment book.

"Third. Because said pretended judgment was left by the defendant with the common-law clerk, and was not left with the equity clerk in said county clerk's office, to be filed with judgments in equity cases.

"Fourth. Because no fee, as required by law, was paid for filing or entering said pretended judgment.

"Fifth. Because said pretended judgment was not a judgment of affirmance with costs, as directed by the order of the General Term of this court on which it was based.

"Sixth. Because said pretended judgment was entered without costs and without any waiver of costs.

"Seventh. Because said pretended judgment was entered without costs with the common-law clerk in the county clerk's office, and said papers, purporting to be a judgment roll, were left by the defendant with the common-law clerk, and placed

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Opinion of the Court, per ALLEN, J.

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with the common-law papers in said county clerk's office, whereby no judgment was or could be docketed."

*Henry L. Clinton* for the appellants. No regular judgment affirming the decision of the Special Term has been entered. (3 R. S. [5th ed.], 638, § 10; 639, §§ 14, 17; Code, §§ 279, 280; *Sche. and S. Plank Road Co. v. Thatcher*, 6 How. Pr., 227.) In no sense has judgment been perfected so that an appeal can be taken. (*Lentillon v. Mayor, etc.*, 3 Sandf., 721; Code, §§ 331, 334-347, 281, 282, 287-310, 311; *Monnell v. Weller*, 2 J. R., 8; *Ellis v. Turner*, 4 Den., 553; *Hanlenbeck v. Gillies*, 2 Hilt., 239.)

*A. R. Dyett* and *Geo. F. Comstock*, for the respondent. The order appealed from was not reviewable in this court. (Code, § 174; *Foot v. Lathrop*, 41 N. Y., 358; *Ives v. Memphis, etc., R. R. Co.*, 58 id., 630; 27 id., 638; 2 id., 186; 3 id., 341.) The court below had no power to set aside the judgment and direct another to be entered in order to allow an appeal to this court, the time for appealing having elapsed. (*Caldwell v. Mayor, etc.*, 19 Paige, 572; *Monroe v. Winter*, 11 id., 529; *Humphrey v. Chamberlin*, 11 N. Y.; *Salles v. Butler*, 27 id., 638; *Wait v. Van Allen*, 22 id., 819; *Morris v. Morange*, 26 How., 247; *Fry v. Bennett*, 16 id., 385; 5 id., 381; 8 id., 312; 2 R. S., 359, § 2; id., 424, § 7, sub.; 14 id., 425, § 10; Code, § 174; 1 Duer, 679; 6 Robt., 472.) No allegation of fraud can be predicated upon an omission to give notice of the judgment. (*People v. Cook*, 8 N. Y., 79; 20 id., 287; 18 id., 295; 23 id., 274; 19 Barb., 249; 40 id., 512; 18 Wend., 608; *Brush v. Lee*, 36 N. Y. 49.)

ALLEN, J. If the merits of the application are reviewable upon this appeal, the order should be affirmed for the reasons assigned in the Supreme Court. But in any view of the case the order is not appealable to this court. If, as is claimed in behalf of the appellants, there has been no judgment perfected by the filing of a judgment roll so as to limit the time

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Opinion of the Court, per ALLEN, J.

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for an appeal and all that was done in that direction was a legal nullity, the substantial rights of the plaintiffs were not impaired, but the way was open to them to proceed as if no paper purporting to be a judgment roll had been filed, or any other proceeding taken after the entry of the decision by the Supreme Court. They had no clear legal right to require a paper by which their legal rights were not affected to be taken from the files of the court. Whether it should be removed from or remain in the pigeon-holes of the clerk, was discretionary with the court below. (*Bank of Genesee v. Spencer*, 18 N. Y., 150; *Foots v. Lathrop*, 41 id., 358; *Ives v. Memphis etc., R. R. Co.*, 58 id., 630.)

If the roll was not in due form, or the filing thereof was for any reason irregular, the granting or refusing the application was discretionary, and the order was not appealable. It affected merely the mode of procedure, which in all cases is within the control of the court of original jurisdiction. (*Arthur v. Griswold Co.*, 55 N. Y., 400.) It was the right of the party to waive the costs of the appeal to the General Term, and by perfecting a judgment upon the order of affirmance without inserting them, he did waive them, and the entry of the judgment was regular, notwithstanding costs were not included. There was no occasion to docket the judgment, as that is only required to create a lien upon lands. There was at least an attempted, if not an actual, compliance with the statute requiring an entry of the judgment in a "judgment book." The law recognizes no distinction between legal and equitable relief, nor requires different judgment books for different classes of actions. If there was technically an irregularity or a departure from the usual practice of the office in entering the judgment in one rather than another book, it was the province of the court below to disregard it or correct the error, or make such order as might be proper, but the action of that court was final.

The appeal must be dismissed.

All concur; ANDREWS, J., absent.

Appeal dismissed.



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Statement of case.

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JAMES V. SCHENCK, Respondent, v. THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, Appellants.

A board of supervisors has authority to direct the purchase of such articles of furniture as are necessary to properly equip and furnish the county jail, and an account for articles so purchased is a proper county charge.

The supervisors of the county of New York have the same power as to furnishing what is known and recognized by law as the county jail, *i. e.*, "the Ludlow street jail," although such jail may technically be the property of the city; and this is so, assuming that such jail cannot be used for the confinement of criminals sentenced by State courts, and that judgment debtors committed upon executions issued out of courts of record are absolutely bound to support themselves.

(Submitted June 20, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city and county of New York affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts are set forth sufficiently in the opinion.

*Wm. C. Whitney* for the appellant.

*Adam C. Ellis* for the respondent. The board of supervisors had power to purchase the goods in question. It was a corporate act. (*People v. Stout*, 23 Barb., 352; 1 Black. Com., 81; *Hall v. Lauderdale*, 46 N. Y., 70; *Bd. Suprs. v. Brenner*, 4 Lans., 24; *People v. Ingersoll*, 58 N. Y., 1; *State Bd. of Agriculture v. Citizens' St. R. Co.*, 17 Am. R., 702; *People v. Goodwin*, 50 Barb., 562; 34 *id.*, 38; 7 Rob., 592; 6 Abb. [N. S.], 63; 5 *id.*, 223; 26 Barb., 256; 10 Abb., 139; 6 N. Y., 560.)

EARL, J. This action was brought to recover the price of certain blankets, mattresses, pillows and bedsteads, alleged by the plaintiff to have been sold and delivered by him to the

county of New York for the use of the county jail. The goods were ordered, audited and allowed by the board of supervisors of the county of New York, and hence the only question to be considered is whether they became a proper charge against the county. If they did, then, under chapter 304 of the Laws of 1874, the city is liable to pay for them.

The various counties of the State are required to have jails, and each is to be erected and maintained at the expense of the county in which it is located. (1 R. S., 369, 380; 2 id., 429, 754.) While there is no express authority to furnish a jail, there can be no doubt that the board of supervisors of any county has authority to do so, by virtue of its general and incidental powers, as the local administrator of the affairs of the county and its local legislature. A jail is a place for the confinement of prisoners and those persons in the custody of the law upon civil or criminal process, and it would not be complete without the means of warming, lodging and feeding the persons confined therein. It is the manifest duty of each county to maintain its jail, in all its equipments, in a condition to safely and properly keep all persons committed thereto.

The powers of a county, as a body politic, can only be exercised through its board of supervisors, and it has power to purchase and hold such personal property as may be necessary to the exercise of its corporate or administrative powers, and to make such orders for the regulation and use of its corporate property as may be deemed conducive to the interests of its inhabitants. The board of supervisors of any county has power to make such orders concerning the corporate property of the county as it may deem expedient, and to examine, settle and allow all accounts chargeable against the county. (1 R. S., 365, 367.) The following expenses are county charges: The expenses necessarily incurred in the support of persons charged with, or convicted of, crimes and committed therefor to the jail of any county; the sums necessarily expended in repairing the court-house and jail of any county, and the contingent expenses necessarily incurred for the use and benefit of the county.

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Opinion of the Court, per EARL, J.

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(1 R. S., 387.) Taking all these provisions and considering them in connection with the general system of our government by which the prisons and their management are committed to the local divisions of the State in which they are situated, with other local affairs, to be administered and managed by officers chosen by those who are to bear the burdens, there can be no doubt that the proper furniture of a county jail, like the furniture of a court-house, clerk's office or poor-house, is a proper county charge. The provision of the statute (2 R. S., 439) which requires the outgoing sheriff to deliver to his successor the jail and its "appurtenances and the property of the county therein," clearly has reference to the furniture in the jail, and shows that the county is expected to own such property.

It is not seriously disputed that this is so as to all the county jails in the State except the jail in the county of New York. It is claimed, however, that that jail did not belong to the county of New York, and hence that the supervisors had no right to incur any expense in furnishing the same. No point seems to have been made at the trial that the Ludlow street jail was not a jail of the county of New York. No proof whatever was given on the subject except that the witnesses all spoke of it as the county jail of the county of New York, and in all the proceedings of the board of supervisors it was spoken of as such. This certainly was enough, in the absence of any contradictory evidence, to show as against the county, that it was a county jail. It is so called in the statutes. (1 R. S., 380, 2 id., 429; Laws of 1860, chap. 510, § 4; Laws of 1861, chap. 240.) It may be that the jail was originally built at the expense of the city, and that at the time these articles were purchased it was technically the property of the city. These circumstances can make no difference. The law had made it the county jail and placed it in the custody of the county and its officers. It was then to perform the functions of a county jail and was to be treated, managed and controlled like any other county jail except as the law changed its status.

It is further claimed that the jail in the county of New

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Opinion of the Court, per EARL, J.

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York can only be used for the confinement of persons committed on civil process, and that as such persons must, by statute, be kept at their own expense, their expenses were not a proper county charge. (2 R. S., 377.) It is provided that persons arrested by virtue of an execution issued upon any judgment rendered in any court of record, and every person surrendered in exoneration of bail, shall be kept at his own expense. All other persons confined in any jail are to be kept at the expense of the county, such as persons held upon *meane* process for civil or criminal contempt, by virtue of process issued by courts not of record, and persons detained as witnesses; all such persons are to be confined by the sheriff in the county jail. It is true that there is no specific provision that they shall be supported in jail at the expense of the county, neither is there any provision that they shall be kept at their own expense, as in the cases above mentioned. There is no doubt that their support is a county charge like that of imprisoned criminals, and, under our system of government, such support could rest nowhere except upon the county. The sheriff is also required to receive into the county jail persons committed by the United States courts, but such persons are to be supported by the United States. (2 R. S., 443, 774.)

Assuming, therefore, but not deciding, that the county jail in the city of New York is not to be used for the confinement of criminals sentenced by State courts, and, also, that judgment debtors committed upon executions issued out of courts of record are absolutely bound to support themselves, yet there was every reason why the county of New York should have a jail, well equipped and furnished, for the custody and confinement of the other persons mentioned.

It follows, from these views, that the judgment must be affirmed, with costs.

All concur; ANDREWS, J., taking no part.

Judgment affirmed.

## Statement of case.

DARIUS B. SMITH, Respondent, v. FRANCIS G. HALL,  
Appellant.

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Plaintiff's complaint alleged, in substance, that he pledged certain bonds to defendant as security for advances to be made; that he tendered the amount advanced and demanded the bonds, but defendant refused to deliver, and converted them to his own use. The answer denied these allegations, and set up, in substance, that the bonds were delivered to defendant with authority to sell, etc. Upon the trial, defendant offered to prove that plaintiff did not own the claim in suit. This was objected to on the ground that it was not set up in the answer, and objection sustained. *Held*, no error; that in the absence of an averment of title in a third person, with which defendant connected himself, or that plaintiff was not the real party in interest, the evidence offered was inadmissible.

67	48
115	30

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143	547

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144	618

Also *held*, that a counter-claim was not proper, as the action was for conversion; and that plaintiff, by replying to a counter-claim, did not waive the objection.

*Austin v. Rawson* (44 N. Y., 63) distinguished.

(Argued June 12, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

The nature of the action and the facts are sufficiently set forth in the opinion.

*E. H. Benn* for the appellant. It was error to refuse to allow defendant to prove that plaintiff did not own the claim. (*Eaton v. Alger*, 57 Barb., 179; *Sanford v. Sanford*, 45 N. Y., 723; *Davis v. Hoppock*, 6 Duer, 255; *Andrews v. Bond*, 16 Barb., 633; *Evans v. Williams*, 60 id., 346; *Thompson v. E. R. R. Co.*, 45 N. Y., 468; *Greenfield v. Mass. Mut. L. Ins. Co.*, 47 id., 430; *Ontario Bk. v. N. J. Stbt. Co.*, 59 id., 514; *Wheeler v. Billings*, 38 id., 263; *Genet v. Davenport*, 58 id., 607.) The court erred in rejecting the counter-claim. (*Austin v. Rawdon*, 44 N. Y., 63; *Conaughy v. Nichols*, 42 id., 83; *Seaman v. Reeve*, 15 Barb., 454.) So far as the error

## Opinion of the Court, per RAPALLO, J.

in rejecting the counter-claim was concerned, it was not material whether the action was on contract or for a conversion. (*Brown v. Buckingham*, 21 How., 190; *Thompson v. Kessal*, 30 N. Y., 389; *Xania Branch Bk. v. Lee*, 7 Abb., 372; 2 Bosw., 694; Code, § 150.)

*H. Bowman Smith* for the respondent. The offer to prove that plaintiff did not own the claim in suit was properly rejected. (6 Bosw., 154; Add. on Torts, 558; Van Sant. Pl., 410, 417; *Seeley v. Engle*, 17 Barb., 530; *Bronson v. C., R. I. and P. R. R. Co.*, 40 id., 48; *Plant v. Schuyler*, 7 Robt., 271, 275; *Witherspoon v. Van Dolar*, 15 How., 266; *Fleury v. Roget*, 5 Sand., 646; *Catlin v. Gunter*, 1 Duer, 253; 7 Abb., 450; *Kissand v. Roberts*, 6 Bosw., 154; *Raynor v. Timerson*, 46 Barb., 526; Code, 121; 60 Barb., 347; 17 Abb., 318; 23 How., 300; 11 id., 380; 5 Duer, 605; 6 Bosw., 601.) This was an action *ex delicto*, not upon contract. (*Durant v. Einstein*, 5 Robt., 423; Story on Bail, §§ 122, 191, 341, 339, 286, 290, 294; *Wilson v. Little*, 2 Com., 443; *Lewis v. Graham*, 4 Abb., 106; 2 Kent's Com., 557; 41 N. Y., 241; 14 Pick., 497, 505, 509.) An action *ex delicto* lies by a pledgor against the pledgee for the conversion of a pledge. (*Wilson v. Little*, 2 Com., 443; *Luckey v. Gannon*, 37 How., 134; *Intl. Bk. v. Monteath*, 39 N. Y., 300; *Markham v. Jardon*, 41 id., 235; *Romaine v. Van Allen*, 26 id., 309; *Reed v. Lambert*, 10 Abb. [N. S.], 428; *Haskins v. Kelly*, 1 id., 63; *Lane v. Bailey*, 47 Barb., 395; *McNeil v. Tenth Nat. Bk.*, 55 id., 59; *Taylor v. Ketchum*, 35 How., 289; *Campbell v. Parker*, 9 Bosw., 322; *Stearns v. Marsh*, 4 Den., 227.)

RAPALLO, J. The complaint alleged, in substance, that the plaintiff pledged to the defendant \$3,000 of town bonds, as security for advances to be made by the defendant. That, afterwards, the plaintiff tendered to the defendant, the full amount of money advanced by him for which the bonds were held in pledge, with the interest thereon, and demanded the

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Opinion of the Court, per RAPALLO, J.

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bonds, but the defendant refused to deliver them, and had converted them to his own use.

The answer denied these allegations, and averred that the bonds were delivered to the defendant with authority to sell them, and, after paying out of the proceeds a certain indebtedness then existing from the plaintiff to the defendant, to pay the balance of the proceeds to the plaintiff; and in the meantime to make advances to the plaintiff on account of such balance. That the defendant sold the bonds, but the proceeds were insufficient to pay the amount due him.

The answer, also, set up certain counter-claims arising on contract.

On the trial, upon conflicting evidence, the judge submitted to the jury the question of fact, whether the bonds were delivered upon the agreement set up in the answer and testified to by the defendant, or under the agreement testified to by the plaintiff, and charged the jury that if they found that the plaintiff's statement of the case was true, and the bonds were given to secure future advances only, the plaintiff was entitled to recover. He further charged that in case they found for the plaintiff, he was entitled to recover the difference between the \$3,000, and the amount of money advanced with interest, which was conceded to be \$2,577.14.

Exceptions were taken to these portions of the charge, but they have not been argued upon this appeal. The appellant now insists upon certain exceptions which were taken during the trial, and which are as follows:

The defendant's counsel offered to prove that the plaintiff did not own the claim in suit. Objection was made that this was not set up in the answer and the court sustained the objection.

This ruling was, we think, correct. The pleadings admitted that the bonds were received by the defendant from or on the order of the plaintiff, and the only dispute was as to the terms upon which they were delivered. In the absence of any averment of title in a third person, with which the defendant connected himself, or of a plea that the plaintiff was not the real party in interest, the evidence was clearly inadmissible.

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Opinion of the Court, per RAPALLO, J.

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The defendant then offered to prove the amount of the old indebtedness of the plaintiff to the defendant. Objection was taken to this proof and sustained, the court holding that this action was for a conversion and the defendant could not set up a counter-claim.

This ruling, also, was, we think, correct, the action was plainly one for conversion, in which a counter-claim was not allowable. The reply of the plaintiff was no waiver of this objection.

The case of *Austin v. Rawdon* (44 N. Y., 63), relied upon by the appellant to show that this was an action on contract is not an authority in his favor on that point. That action was founded on an agreement by the defendants to deliver certain securities. The allegation that the refusal to deliver them was wrongful, and that the defendants wrongfully disposed of and converted them, did not make it an action of tort. All these acts were simply a violation of their contract. In the present case the right of the plaintiff to the bonds, is founded upon his own title and not upon any promise of the defendant. The wrong done is the conversion of *his* property, not the mere breach of an agreement to deliver property to him.

The proof offered was not material for any other purpose than to establish a counter-claim. If the bonds were delivered as security for the old indebtedness, or for the purpose of satisfying it, the action must have failed, and the court so charged. It was conceded that the amount tendered was only that of the subsequent advances and interest. The fact of the old indebtedness had been proved; the precise amount of it was of no consequence. The jury having found that the pledge was as security for the new advances only, and the proof offered, not having any bearing on that question, it was wholly irrelevant.

The judgment should be affirmed.

All concur; MILLER, J., not sitting.

Judgment affirmed.



## Statement of case.

JAMES MAHER, by Guardian, etc., Respondent, v. THE CENTRAL PARK, NORTH AND EAST RIVER RAILROAD COMPANY, Appellant.

In an action to recover damages for injuries alleged to have been occasioned by the negligence of the driver of one of defendant's street cars, plaintiff's evidence tended to show that he, an infant ten years old, with two companions, desiring to take passage, hailed the car, the driver stopped and the boys started to go to the back platform; the driver told plaintiff to jump on in front; he did so, and was on the first step, attempting to step on to the second, when the driver struck the horses, the car gave a jog, knocking plaintiff off, and he was injured. *Held*, that the evidence justified a verdict for plaintiff; that the fact that he jumped on to the front platform did not, under the circumstances, establish contributory negligence, as matter of law, but it was a question for the jury. This court cannot interfere with a judgment because excessive damages have been allowed.

(Submitted June 20, 1876; decided September 19, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 7 J. & S., 155.)

This action was brought to recover damages for injuries alleged to have been sustained through the negligence of defendant's employe.

Plaintiff's evidence tended to show that he, with two other lads, his companions, signaled to one of defendant's cars and called to the driver to stop; he did so, and the boys started to get on to the rear platform. The driver told plaintiff to get on in front; he got on to the first step, and was stepping up to the second, when the driver struck the horses, they jumped, giving the car a jog which knocked plaintiff off; he fell and the car wheel ran over his legs. Plaintiff was at the time an infant, about ten years of age.

Defendant's counsel moved to dismiss the complaint on the grounds that plaintiff's negligence contributed to the injury, and that no negligence was shown on the part of

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Opinion of the Court, per MILLER, J.

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defendant. The motion was denied, and defendant's counsel duly excepted. Said counsel requested the court to charge, among other things, as follows :

"Third. It was negligence on the part of the plaintiff, under the evidence in this case, to get on the front platform of this car.

"Fourth. The negligence of the plaintiff, in attempting to get on the front platform, contributed to the accident.

"Fifth. The front platform is a place of danger, and the occupation of the front platform, or an attempt to get on the front platform, is *prima facie* evidence of negligence on the part of the passengers.

"Eighth. That there is no evidence in this case that the driver told the boys to jump on to the front platform."

"The court: I will leave that entirely to the jury to say whether such language was used or not."

Defendant's counsel duly excepted to the court's leaving this last matter to the jury to decide as a fact from the evidence.

Further facts appear in the opinion.

*Brown, Hall & Vanderpoel* for the appellant.

*John Graham* for the respondent. The question whether plaintiff was guilty of contributory negligence was properly submitted to the jury. (*O'Mara v. H. R. R. Co.*, 38 N. Y., 445; *Filer v. N. Y. C. R. R. Co.*, 49 id., 47; *Mowrey v. Cent. City R. Co.*, 51 id., 666; *Thurber v. H. B. M. and F. R. R. Co.*, 60 id., 326; *McIntyre v. N. Y. C. R. R. Co.*, 37 id., 287; *Clarke v. Eighth Ave. R. R. Co.*, 36 id., 135; *Willis v. L. I. R. R. Co.*, 34 id., 670; *Morrison v. Erie R. Co.*, 56 id., 302; *Roberts v. Johnson*, 58 id., 613.)

MILLER, J. At the close of the plaintiff's case and again at the close of the trial, the defendant's counsel moved to dismiss the complaint substantially upon the grounds: First. That the plaintiff had not shown himself free from negligence, but on the contrary, negligence of the plaintiff contributed to

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Opinion of the Court, per MILLER, J.

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the accident. Second. That there had been no negligence shown on the part of the defendant. The plaintiff was an infant of the age of ten years and upwards, and the injury was occasioned as is claimed by the negligence of the driver on defendant's horse railway car in the city of New York, in starting the car after he stopped for the plaintiff and his associates, two other boys, to get on before they had a full opportunity to do so. According to the version of the plaintiff and his witnesses, which must be regarded as correct upon appeal, the driver stopped the car and told the boys to jump on. They started to go to the back platform for that purpose and the driver then told plaintiff to jump on in front. He did so, and was on the first step and attempting to get on the second, when the driver struck the horses, the car gave a jog, knocked plaintiff off and his leg was injured so that it became necessary to amputate one of his feet. One of plaintiff's associates was also thrown off at the same time by the jar, and the other boy did not get on the car. The plaintiff, it is claimed, was negligent in attempting to get on the front platform of the car instead of the rear platform, as well as in attempting to get on the car while it was in motion. The question of contributory negligence according to the adjudications in this State, is generally a matter for the consideration of the jury, and unless such negligence is plainly and clearly made out, should not be withheld from them. It is not enough to authorize a nonsuit that the evidence would warrant the jury in finding that the plaintiff was negligent, and that his negligence contributed to produce the injury, but when it is in doubt from the evidence whether negligence is established, that question as we have seen must be determined by the judgment of the jury. (*Thurber v. Harlem, B. M. and F. R. R. Co.*, 60 N. Y., 326.) The fact that the plaintiff jumped on the front platform of itself, and under the proof was not sufficient to establish negligence as a matter of law. He was bound to exercise proper care and caution and the prudence required of an infant of tender years, is to be measured by his maturity and capacity, and need be only of that degree which might be

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Opinion of the Court, per MILLER, J.

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reasonably expected in view thereof. (See case cited, *supra*.) Under the circumstances it is not clear that the plaintiff was chargeable with strict legal negligence. As is manifest, there was proof to show that he was invited by the driver to get on in front, and only followed his directions by so doing. The authorities are numerous, that persons who are traveling on a railroad car, are justified in following the directions or request of the employe in charge while he is engaged in the direct line of his duty, in assisting passengers in getting off and on a car, or in directing them while so doing. They may very properly assume that such employes are familiar with the operations of the cars, and have knowledge of what is required for safety and protection while giving such directions. (*Filer v. N. Y. C. R. R. Co.*, 49 N. Y., 47; S. C., 59 id., 351; *Clark v. Eighth Av. R. R. Co.*, 36 id., 135; *McIntyre v. N. Y. C. R. R. Co.*, 37 id., 287.) Having in view the rule referred to, the plaintiff was authorized to get on the car by the front platform, and unless he was negligent in so doing the act was no bar to a recovery. Whether he acted with such circumspection, prudence and care, as was demanded in following the directions given under the facts and circumstances proved, was a question of fact, and under the proof negligence, as a matter of law, could not fairly be imputed to him. Nor can it be claimed as an established, uncontradicted fact in the case, that the plaintiff made an effort to get on the car while it was in motion. The testimony on this subject was conflicting, all three of the boys testifying that the car was stopped, and it cannot be assumed, therefore, that the car did not stop.

The question arising as to the negligence of the defendant, was also properly left to the jury. Upon this subject there was evidence upon both sides, and it is not the province of this court when such is the case, to assume to determine where the weight of the testimony lies. The General Term have the power to review the facts for such a purpose, but if the verdict can be upheld in any view of the facts, this court cannot interfere. (*Hazman v. The Hoboken Land and Improvement Co.*, 50 N. Y., 53; *Hamilton v. Third Av. R. R. Co.*,

## Statement of case.

53 id., 25.) It follows, that the motion to dismiss the complaint was properly denied.

The request to charge that it was negligence for the plaintiff under the evidence to attempt to get on the platform, was properly disposed of by adding to the request the qualification if the jury believed he did so without the car stopping or being stopped.

The fourth and fifth requests to charge, were also properly modified and as thus corrected properly charged.

The eighth request, that there was no evidence in the case that the driver told the boys to jump on the front platform, was also properly refused as there was testimony as we have seen to that effect and the court properly submitted it for the jury to determine whether such language was used.

Even if it was clear that the damages were excessive, it is not the province of this court to interfere on any such ground.

The judgment was right and must be affirmed, with costs.

All concur; ANDREWS, J., absent.

Judgment affirmed.

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GEORGE H. MERCER, Respondent v. FRANCIS VOSE, Appellant.

One who has himself rendered services to another is competent to give evidence as to the value of the services.

Witnesses having peculiar knowledge as to services rendered, and some general knowledge of the value thereof, may give opinions as to the value, based either upon their own knowledge or upon a hypothetical case, including some or all of the facts proved.

In an action to recover a balance alleged to be due for services upon a *quantum meruit*, it appeared that when plaintiff left defendant's employ he demanded his pay, and that the action was commenced in about a month thereafter; the referee allowed interest upon the balance found due from the time of the demand. *Held*, that plaintiff was, at least, entitled to interest from the commencement of the action, and the error, if any, in allowing it from the time of the demand, was not sufficiently substantial to call for a correction here, particularly in the absence of a specific objection pointing out the deduction required.

(Argued June 14, 1876; decided September 19, 1876.)

67	56
114	339
67	56
121	233

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Opinion of the Court, per EARL, J.

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APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The nature of the action and the facts appear sufficiently in the opinion.

*Samuel Hand* for the appellant. The referee erred in overruling defendant's objection to admitting in evidence the opinion of plaintiff and his other witnesses as to the value of his services. (*Hoyt v. L. I. R. R. Co.*, 57 N. Y., 678; *Slater v. Wilcox*, 57 Barb., 604; *Harris v. Panama R. R. Co.*, 3 Bos., 7; 1 Greenl. on Ev., §§ 440, 554; 1 Phil. on Ev., 290, 291; 3 C. & H. Notes, 759-763; 2 Taylor on Ev., 1226-1233; *Lamoure v. Caryl*, 4 Den., 370; *Perrine v. Hotchkiss*, 58 Barb., 77; *Van Zant v. Mut. B. L. Ins. Co.*, 55 N. Y., 69.) It was error to allow interest on the services from November 21, 1871, to March 21, 1873. (*Godfrey v. Moser*, 5 T. & C., 675; *Smith v. Viele*, 60 N. Y., 106; *Reid v. V. R. Glass Co.*, 3 Cow., 393; *Van Buren v. Van Gasbeck*, 4 id., 496; *McMahon v. N. Y. C. R. R. Co.*, 20 N. Y., 463, 469; *Newlin v. Lyon*, 49 id., 661.)

*Osborne E. Bright* for the respondent. Plaintiff was entitled to recover interest. (*Van Rensselaer v. Jewett*, 2 N. Y., 135; *Adams v. Ft. Plain Bk.*, 36 id., 261; *Livingston v. Miller*, 11 id., 80; *Dana v. Fielder*, 12 id., 40; *B. and H. T. Co. v. City of Buffalo*, 58 id., 639; *Hover v. Heath*, 5 T. & C., 488; *McMahon v. N. J. and E. R. R. Co.*, 20 N. Y., 469.)

EARL, J. This is an action by the plaintiff to recover for his services rendered to the defendant in New York and Florida in and about the collection of certain demands and in the attempt to adjust certain complicated business matters of the defendant. The parties were sworn and differed widely in their evidence as to the arrangement between them. It is quite uncertain what the arrangement was, but the referee

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Opinion of the Court, per EARL, J.

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having found it to be, as claimed by the plaintiff, upon sufficient evidence, and his finding having been affirmed at General Term, we must take the facts to be as found by him. It only remains, therefore, for us to consider certain exceptions taken to the rulings of the referee during the progress of the trial.

The opinion of the plaintiff and his witnesses as to the value of his services were properly received. Witnesses may give opinions as to the value of services of which they had peculiar knowledge, which a jury is not supposed to possess. They may base their opinions upon what they know of the services rendered, or upon a hypothetical case, including some or all the facts proven and the jury will determine from the skill of the witnesses and all the other circumstances the weight to be given to the opinions. (*Lamoure v. Caryl*, 4 Denio, 370; *Scott v. Lilienthal*, 9 Bos., 225; *Jackson v. N. Y. C. R. R. Co.*, 2 N. Y. S. C. [T. & C.], 653.) As to the plaintiff he knew all about the services he rendered and he had some general knowledge of the value of such services. I can conceive of no case where one has himself rendered a service to another, when he will not be competent to give evidence of its value. Knowing the precise nature of the service rendered, he must have some knowledge of its value, and he is thus competent to give his opinion. It may not be worth much. Its weight, however, is for the jury. The other witnesses were well acquainted with the plaintiff, and his business capacity, and had some general knowledge of the value of such services as he rendered. Their business had been such as to make them acquainted with the prices paid for such services, and their opinions were based upon a hypothetical case stated to them, and were properly received.

The referee found the balance due the plaintiff at the time he left defendant's service and demanded his pay, and then on that balance allowed interest from that time to the date of his report. This allowance of interest is now complained of as error. The account for services was not liquidated, and as to the balance recovered, the allowance was based upon a *quantum meruit*. Upon the facts of this case, the plaintiff was entitled to

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Statement of case.

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recover interest at least from the commencement of the action. (*McCollum v. Seward*, 62 N. Y., 316.) And as the action was commenced in about one month after the date taken by the referee, the error, if any, in the allowance of interest, is not sufficiently substantial to call for any correction here, particularly in the absence of any specific exception pointing out the trifling reduction required.

We have carefully examined all the other allegations of error and find none of them well taken.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. JOHN MILLER, Respondent, v. CANNING  
E. GRISWOLD, Commissioner, etc., Appellant.

Under the provisions of the Revised Statutes providing for the laying out of new roads, and the discontinuing of old ones (1 R. S., 502, *et seq.*), where a new road has been regularly laid out, it cannot be discontinued as an old one, before it has been opened and used, and when there has been no change of circumstances, removing the occasion for it and rendering it unnecessary.

The language of the statute (1 R. S., 517, § 81), authorizing the discontinuance of an old road where it has "become useless and unnecessary," implies a road for a time opened, but by a change of circumstances losing its usefulness; not a uselessness existing at the time it was laid out. As to the necessity of the road at that time, the finding of the jury of freeholders in proceedings to lay it out is conclusive unless appealed from. *Clark v. Commissioners* (1 T. & C., 198) distinguished.

(Submitted September 18, 1876 ; decided September 26, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, affirming an order of Special Term, directing the issuing of a writ of peremptory mandamus commanding defendant, as commissioner of highways, of the town of Sheridan, Chautauqua county, to open and work a highway previously laid out by the commissioner of highways of said town.



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Opinion of the Court, per FOLGER, J.

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It appeared that on June 25, 1870, an order was regularly made and filed by William D. Strong, the then commissioner of said town, laying out said highway. Commissioners were appointed, and the damages duly assessed. No appeal was taken from the order or the assessment. The highway was not opened or worked, and on July 6, 1870, defendant, upon the certificate of twelve freeholders that said highway was unnecessary and useless, made and filed an order discontinuing it, and thereupon refused to open and work it.

*C. D. Murray* for the appellant. The highway having been legally discontinued it was error to allow a mandamus. (2 R. S. [5th ed.], 394; §§ 69, 70; *id.*, 403, §§ 120, 121, 122, 123; *People ex rel. Clark v. Commissioners of Reading*, 1 T. & C., 193.)

*J. S. Russell* for the respondent. The preliminary steps having been taken, the commissioner, as a ministerial officer, was bound to open and work the highway. (1 Stat. at Large, 480, § 96; 3 *id.*, 306, § 13; *People ex rel. Shant v. Commissioners of Highways*, 16 J. R., 60.) The granting of the mandamus was proper. (*People ex rel. Doughty v. Judges of Dutchess*, 20 Wend., 658; *People ex rel. Case v. Collins Commissioner*, 19 *id.*, 55; *McCullough v. Mayor of Brooklyn, etc.*, 23 *id.*, 459.) The order discontinuing the highway having been obtained before it was opened and worked was void. (§ 18, art. 4, title 1, chap. 16, part 1 of R. S.; *People ex rel. Lyn v. Pike*, 18 How., 70; 2 T. & C., 352; *Miller v. Garlock*, 8 Barb., 157.)

FOLGER, J. The Revised Statutes give to commissioners of highways the power to lay out new roads, and to discontinue old roads. (1 R. S., 502, § 2.) They prescribe the facts which must exist, and the proceedings which must be taken, to exercise this power. (*Id.* 513, §§ 54, 55; p. 517 §§ 81, 82.) The predecessor of the appellant lawfully exercised his power, and the road in question became a new road laid out, though

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Opinion of the Court, per FOLGER, J.

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never travelled upon, worked or opened ; for the statutes distinguish between a road laid out, and a road opened, worked and used. (Id., p. 515, § 64.) The appellant, in his effort to exercise the power of discontinuing the road, was regular in all the steps taken, and has made lawful exercise of it, if this road is, within the meaning of the statute, an old road become useless and unnecessary. The word old, as used in these statutes, is not necessarily to be taken as meaning long-existing, ancient. The power to discontinue roads is given, not because they have been for a long time open to the public, but because, after having been some time open, they have become useless and unnecessary. (Id., p. 517, § 81.) The jury called to consider the application to discontinue, and sworn to examine and certify in regard to the propriety of the discontinuance (id.), are only to find and certify that the road is useless and unnecessary, not that it is old. (Id., § 82.) The words, a new road, in the statutes, mean a road newly laid out where one was not ; and the words, an old road, are the opposite thereto, and mean one laid out and used, whether long ago or of more recent date.

And the whole policy of the statutes, as shown by all their provisions, does call for some length of existence of a road, before it can be discontinued as an old road. The scheme of the statutes requires the certificate of twelve freeholders, given on oath, of the necessity and propriety of the road applied for, before it can be laid out. That scheme looks upon the finding of that jury as final for the time, and until the road has been opened and used, and experiment made of its use and the need for it, or until some change in the circumstances which induced the action of the first jury; unless an appeal is taken therefrom. It does not contemplate a submission thereto without appeal, and before any change in the facts, an immediate calling of other twelve freeholders under the form of a discontinuance of an old road, to again examine as to the original necessity and use of the road, haply with a different conclusion. It provides for an appeal (id., p. 518, § 83, Laws of 1847, chap. 455, § 8, p. 584), and it makes

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Opinion of the Court, per FOLGER, J.

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the decision upon that appeal conclusive (1 R. S., p. 519, § 89), and declares that it shall remain unaltered for a space of four years. (Laws of 1847, *supra*, § 9.) Manifestly it looks to stability in the determination of highway commissioners in the laying out of roads, and does not permit vacillation, and capricious or wilful change therein annually. Again, the old road may be discontinued when it becomes useless and unnecessary. This language implies a road for a time open to the public for its use, but by change of circumstances, and of local needs and habits of trade and intercourse, losing usefulness. It does not mean a uselessness existing at the laying out of it. That has been passed upon by a jury, and the use for it found. The same question is not to be at once submitted to another jury; ordinarily the road must be opened, and time must elapse to prove its use or the contrary. We cannot but regard the action of the appellant and the applicants to him, as an attempt to reverse the determination of the former commissioner, rather than as a movement in good faith to discontinue an old road, on account of it having become useless and unnecessary. That action was not based upon a change from the circumstances in which the road was laid out; but upon the very same facts as then existed, they asked and obtained from another jury a different certificate thereupon. We do not think that this is what the statute contemplated.

The case of *Clark v. The Commissioners* (1 Sup. Ct. [T. & C.], 193), cited by appellant, is not necessarily in conflict with these views. The decision is there put upon two grounds; one of which is, that though the road was never opened, it was liable to discontinuance, for the reason that by the opening of another road, the occasion for it had ceased; not that the occasion for it had never existed. We are not, therefore, called upon to say whether or not we disapprove of that case.

The appellant seems to rely upon sections 54, 55, 1 Revised Statutes, page 513, and if we understand him aright, he contends that any road, old or new, may be discontinued by the commissioner of highways, on the application of a person liable to be

## Statement of case.

assessed for highway labor, and that relief from the order of discontinuance may be had, only by appeal therefrom. It is not needed that we decide whether such is the effect of those sections. The appellant did not proceed under them alone, but under section 81 (*supra*), which we have commented upon. The fact that the relator took an appeal from the order of the appellant is not material. The order was void, for the reason that the appellant had not jurisdiction to make it; hence neither it nor the appeal from it stands in the way of this proceeding.

The order appealed from should be affirmed.

All concur, except CHURCH, Ch. J., not voting; RAPALLO, J., absent.

Order affirmed.

WILLIAM G. ACKERMAN, Appellant, v. CHARLES E. GORTON,  
Respondent.

H. devised certain real estate to his wife "to be used and enjoyed by her during her natural life, and from and immediately after her decease \* \* \* to be divided equally among" his children. By a codicil he authorized his wife to sell and convey his real estate, subject, however, to the approval of all his heirs surviving at the time of such sale. After the death of H., the widow, with the consent of the surviving heirs, sold and conveyed said real estate, but, prior thereto, two judgments had been recovered and docketed against A., one of the children. Upon a case submitted to determine the validity of the title so conveyed, *held*, that upon the death of H. his children took a vested remainder in the lands so devised, subject to be defeated by a sale under the power given to the widow; that such power did not enlarge the widow's estate into a fee, nor was it the testator's intention to give to her the whole proceeds in case of sale; but that the parties should take the same interest therein as they had in the lands, she to have the income, and upon her death the principal to go to the children; that the judgments against A. became liens upon his interest, subject, however, to the power of sale; and that a *bona fide* sale gave to the purchaser a good title, free from such liens, they being transferred from the lands, and attaching to the interest of A. in the proceeds.

*Ackerman v. Hoyt* (6 Hun [Mem.], 801) reversed.

(Argued September 18, 1876; decided September 20, 1876).

67	63
126	433
67	63
127	560

## Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department in favor of defendant, entered upon a case submitted under section 372 of the Code.

Belding Hoyt, late of Yonkers, Westchester county, died June 21, 1874, leaving a will and codicil. The will, after certain bequests, contained these clauses :

"Third. I give and devise all the rest, residue and remainder of my real and personal estate to my beloved wife, Rebecca, to be used and enjoyed by her during the term of her natural life, and from and immediately after her decease, I give and devise the same as follows : To my daughter, Emeline Adelia, the homestead property, that is to say, the dwelling-house in which I now reside, together with all that piece or parcel of land upon which the said dwelling stands, bounded on the north by land of Noah B. Hoyt, on the east by the stone fence as it now stands, on the south by land of Anson B. Hoyt, and on the west by the Albany post-road, or Broadway, to be used and enjoyed by her during the term of her natural life, and from and immediately after her decease to be divided equally among my children, Anson B. Hoyt, Noah B. Hoyt and George W. Hoyt, share and share alike, and, also, I give and bequeath to my said daughter, Emeline Adelia, all of my household furniture. And the rest, residue and remainder of my real and personal estate shall be divided equally among my children, Anson B. Hoyt, Noah B. Hoyt, George W. Hoyt, and Emeline Adelia, share and share alike. In case of the death of any or either of my said children, Anson B., Noah B., George W., or Emeline Adelia, before having received the property to which, by the provisions of this will, they would have been entitled, without leaving issue, him, her or them, surviving, then the said portion or portions shall be divided equally among the survivors of him, her or them, share and share alike. And if any or either of my said children should die, as aforesaid, leaving lawful issue, him, her or them, surviving, then the children of him, her or them

## Statement of case.

shall be entitled to receive the parent's share, and the same shall be divided equally among them."

The material portion of the codicil was as follows:

"I do, by this, my writing, which I hereby declare to be a codicil to my said last will and testament, and to be taken as a part thereof, order and declare that my will is, that my said wife, Rebecca, may, at any time during her lifetime, sell and dispose of any or all of my real estate, giving and granting unto my said wife full power and authority to execute and deliver to the purchaser or purchasers thereof the proper instruments in writing for the conveyance of the same in law. Provided, nevertheless, and upon the express condition that such sale or sales shall be subject to the approval of each and every of the heirs of my said estate, surviving at the time of such sale or sales as aforesaid."

In January, 1875, the widow, with the consent of all the heirs then surviving, who joined in the conveyance, sold and conveyed certain of the real estate of which said testator died seized, to Adelia Emeline Hoyt, who, in March, 1875, conveyed the same to plaintiff. After the death of said testator and prior to the conveyance by his widow, two judgments were recovered and docketed in Westchester county against Anson B. Hoyt, one of the testator's children. In September, 1875, plaintiff contracted to sell a portion of the lands so conveyed to him to defendant, who refused to pay the purchase-money and take a conveyance, alleging that plaintiff's title was defective.

*Ralph E. Prime* for the appellant. The judgment debtor, Hoyt, never had any interest whatever in the land upon which the lien of a judgment could attach. (1 R. S., \*735, § 107; \*736, § 112; \*729, § 59; \*732, §§ 77, 79; \*733, § 85; *Blanchard v. Blanchard*, 4 Hun, 287, 291.) The devise to the widow was a power in trust, and did not convey to her a fee. (§ 81 [101], 24 [5th ed.], R. S.) The estate of Anson B. Hoyt was a vested future estate, and as such could be sold on execution. (*Shenden v. House*, 4 Keyes, 569; *Jackson v.*

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Opinion of the Court, per ANDREWS, J.

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*Middleton*, 25 Barb., 9; 3 R. S. [5th ed.], 13.) The judgment against Hoyt was a lien upon the property in question. (Code, § 282; § 84, p. 22 [5th ed.], R. S.)

*Matt. H. Ellis* for the respondent.

ANDREWS, J. The children of Belding Hoyt, upon his death, took under his will a vested estate in remainder in the lands devised to his wife for her life. The words "from and immediately after her death," did not operate to postpone the vesting of the remainder in the children until the death of the life tenant, but by well settled construction denoted simply the period when they would become entitled to the estate in possession. (*Livingston v. Greene*, 52 N. Y., 118; *Taggart v. Murray*, 53 id., 233.) But the estate of the remaindermen was liable to be divested by a sale of the land by the widow under the power given by the will. The claim that the power given to the life tenant to dispose of the fee, enlarged her estate to a fee is not well founded. (1 R. S., 732, § 81.) The power of disposition was not absolute. It was given on condition that it should not be exercised without the approval of the testator's heirs, surviving when the sale was made. The object of the power seems to have been to enable the widow, with the consent of the children to convert the real estate into money, so as to give her the income for her support instead of the rents and profits of the land. The power was not a beneficial one within the definition of the statute. (1 R. S., 732, § 79.) It was not the intention of the testator to give the widow the whole proceeds of the land in case of sale. The express gift of the remainder to the children, and the provision that the land should not be sold without their consent is inconsistent with such a construction of the will. In case of a sale under the power, the tenant for life, and the devisees in remainder would take the same interest in the proceeds as they had in the land; the income would belong to the widow for life, and the principal after her death to the children. The judgments against Anson B. Hoyt one of the sons of the

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Statement of case.

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testator, obtained before a sale had been made under the power, became a lien on his interest in remainder in the lands of the testator. But this did not prevent the power from being thereafter exercised. The right of the judgment creditors was subject to it, and a *bona fide* sale of the land, made in pursuance of the power, would give to the purchaser a good title, free from the lien of the judgments. The lien of the judgment creditors in case of sale would be transferred from the land and attach to the interest of the judgment debtor in the proceeds.

The will of the testator is to be observed, and his purpose ought not to be defeated, as it would be if it should be held that the land could not be sold under the power, or if sold, that the sale should be subject to the lien of the judgments.

We are of opinion that upon the facts stated in the case, the plaintiff has a good title to the land embraced in the contract, and that the defendant should be decreed specifically to perform it.

The judgment of the General Term should be reversed, and judgment ordered in conformity with this opinion.

All concur; RAPALLO, J., absent.

Judgment reversed, and judgment accordingly

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GEORGE H. WOOSTER, Respondent, v. RUSSELL SAGE,  
Appellant.

Plaintiff purchased of defendant certain railroad bonds, with the option of returning if he became sick of them, in which case defendant agreed to repay the purchase-money. Plaintiff sold the bonds to others, for whom, as the evidence tended to show, he made the investment, giving them the same option; this they exercised, and plaintiff received back the bonds, tendered them back to defendant and demanded the purchase-money, which defendant refused to repay. In an action to recover the same, *held*, that the transfer by plaintiff did not impair his right to return the bonds.

Plaintiff did not offer to return the bonds until about three years after his purchase. Plaintiff gave some evidence tending to show that the

87	67
116	141
116	143

87	67
120	448



## Statement of case.

delay was at the request of defendant; the latter, at the close of plaintiff's evidence, moved for a nonsuit on the ground, among other things, that the agreement was within the statute of frauds, which was denied. The question of time was not afterwards presented, nor was there any request to present it to the jury. *Held*, that the nonsuit was properly denied; that under all the circumstances, as developed, the case did not show conclusively, as matter of law, that the delay was unreasonable; and if it did the point was not available, as there was no exception presenting it.

Also *held*, that the receipt by defendant of the amount of two coupons upon the bonds did not affect his right of recovery, he accounting for the amount received.

Evidence as to the amount of damages is not necessary in such an action.

(Argued September 18, 1876; decided October 3, 1876).

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, modifying and affirming as modified a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 6 Hun, 285.)

This action was brought to recover back the purchase-price paid for two railroad bonds.

In March, 1870, plaintiff purchased of defendant two coupon bonds of the Des Moines Valley Railroad Company, each for \$1,000, for \$1,800. Plaintiff testified that the agreement was that if at any time he "became sick" of the bonds defendant would take them back, refunding the purchase-price, also that he informed defendant that he had an order from two lady friends for bonds. Plaintiff, soon after the purchase, sold the bonds to two ladies, one to each, stating to them defendant's representations, and gave them the same option as to returning. A payment of interest on the bonds not having been made when due, plaintiff expressed dissatisfaction and a desire to return the bonds. Defendant asserted they were all right and requested plaintiff to hold on. The purchasers of the bonds from plaintiff returned them to him. He received them back. Some three years after his purchase he presented them to defendant and demanded back the purchase-price. Defendant refused to receive the bonds and to refund the purchase-money. They were produced and offered to be sur-

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Statement of case

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rendered on the trial. Two of the coupons upon each of the bonds had been removed after plaintiff's purchase.

At the close of plaintiff's evidence, defendant's counsel moved for a nonsuit, on the grounds that no damage was alleged or proved, also that the contract was within the statute of frauds, and no written evidence thereof was produced. The motion was denied and said counsel duly excepted. At the close of the case said counsel moved for a dismissal of the complaint on the same grounds, also on the grounds that the evidence was that plaintiff did not return the bonds when he got sick of them, and that he abandoned the contract when he parted with the bonds to others. This motion was denied, and defendant's counsel duly excepted. Said counsel requested the court to charge :

1. That if the jury believe that the plaintiff originally bought the bonds for investment for himself and subsequently desired or determined to part with them, it was his duty to offer them to the defendant before offering them to any other person.

2. That if the jury believe that the plaintiff originally bought the bonds for investment for himself, and afterwards became sick of them, and instead of offering them to the defendant, sold and delivered them to other persons, he by such sale and delivery waived the benefit of the defendant's alleged contract.

3. That at the utmost the plaintiff, under the evidence, is entitled to only nominal damages.

The court declined so to charge, and defendant's counsel excepted.

The court charged in substance, among other things, that if the agreement was as testified to by plaintiff, defendant was bound to take them back, and to pay back the purchase-money, whether the bonds were good or bad, whether they rose or fell in the market; also, that the transaction with the ladies did not affect his right to return, and had no materiality except to aid in determining the truth as to the original contract, and that if they found for the plaintiff he was entitled to the amount of the purchase-price, with interest, to all

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Opinion of the Court, per *Curiam*.

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which defendant's counsel duly excepted. The General Term modified the judgment by deducting therefrom the amount of the coupons taken from the bonds, with interest.

*C. M. Da Costa* for the appellant. The sale, by plaintiff, made his title absolute, and put an end to his option. (*Charter v. Stevens*, 3 Den., 38.) The purchase-money paid by the vendee is not the measure of damages. (*Giles v. Bradley*, 2 J. Cas., 253.) No basis was furnished for awarding more than nominal damages. (*Potter v. Le Roy*, 30 N. Y., 549, 556; *Dustan v. McAndrew*, 44 id., 98.)

*De Witt Stafford* for the respondent. Plaintiff had a right, by the contract, to return the bonds. (Chitty on Cont., [new ed.], 650, note J.; Story on Cont. [5th ed.], 305, § 1091; Story on Sales [2d ed.], 433; *Eno v. Woodward*, 4 Comst., 249; *Bridgford v. Croker*, 60 N. Y., 627; *Dustan v. McAndrew*, 44 id., 72; *Bement v. Smith*, 15 Wend., 453; *Shannon v. Comstock*, 21 id., 460; *Slade v. Morley*, 4 Coke, 92 b.; *Orr v. Bigelow*, 14 N. Y., 556; *Burrell v. Rott*, 40 id., 496; *George v. Brader*, 70 Penn. St., 56; *Giles v. Bradley*, 2 J. Ch., 253.) Plaintiff's transactions with the persons to whom he sold the bonds were not material. (*Oatman v. Taylor*, 29 N. Y., 649, 663; *Malony v. Horan*, 12 Abb. [N. S.], 289; *Brown v. Bowen*, 30 N. Y., 541; *Plumb v. Cat. Co. Mut. Ins. Co.*, 18 id., 392; *Hutchins v. Hebbard*, 34 id., 24.)

*Per Curiam*. This action was brought to recover back the purchase-price of two railroad bonds at \$1,800, which were purchased upon certain representations and with the option to return if the purchaser became sick of them, in which case the defendant was to repay the purchase-money.

The plaintiff, soon after the purchase, sold them to two ladies, one to each, and the evidence tends to show that he made the investment for them. When he sold them he stated to the ladies the representations of the defendant, and gave

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Opinion of the Court, per *Curiam*.

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them the same option, which they exercised, after which the plaintiff offered to return the bonds. The court charged that the transaction with the ladies did not impair the right of the plaintiff to return the bonds, which is strenuously insisted to be error. We have carefully examined the elaborate brief of the learned counsel for the defendant upon this point and the authorities cited by him, and feel constrained to disagree with him and concur with the General Term affirming the decision at Circuit. If the sale had been absolute the plaintiff might be deemed to have exercised his option not to return the property upon the ground that the act was inconsistent with the continuance of the option. But the sale was not absolute. The same right was expressly reserved and continued. There is some force in the argument that the defendant's agreement to receive back the bonds and return the purchase-money was limited to the contingency only of the plaintiff's becoming "sick" of the bonds, and not of third persons who might purchase from him. But there was no restriction in the agreement. It was not made material how or for what reason the plaintiff became dissatisfied, or by what influences. He may have acted upon the advice of a friend or submitted to the opinion of a third person. His dissatisfaction, however produced, gave him the unqualified right to return. The defendant had no election to exercise, and was not injured in a legal sense by the transaction with the ladies. When the plaintiff offered to return the bonds, he was dissatisfied with them. He had this option, and the transaction with the ladies was not an act inconsistent with the exercise of this right. He did not, by that transaction, place it beyond his power to return them, as such a return was contemplated by the terms of the transaction itself. We have not been referred to any authority adverse to these views.

We concur, also, with the court below, that the question of time was not distinctly presented except on a motion for nonsuit. The nonsuit was properly denied on that ground, because there was evidence tending to show that the delay was at the request of the defendant, and the case does not

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Opinion of the Court, per *Curiam*.

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show that the point was afterwards presented. It is said that other propositions charged involved the question of time. If this is true, it was only indirectly and inferentially. The court charged, it is true, that if the contract was as alleged the plaintiff was entitled to recover, but this proposition was intended only to decide the nature and legal character of the agreement. So in respect to the charge that the transaction with the ladies was immaterial. This was only deciding that the fact of such a sale in its character did not preclude the plaintiff from returning the bonds. In order to predicate error the point in controversy should be distinctly presented to the mind of the judge and a decision made thereon. This was not done. If it had been it is impossible to determine what the decision would have been. Nor was there any request to submit the question to the jury. The delay was considerable and perhaps unreasonable, but the effect of the conversation between the parties soon after the purchase might be regarded as an excuse, or justification for not returning the bonds earlier and if a question had been made the fact whether this conversation took place, might and probably would have been submitted to the jury. It is not allowable for a party thus to lie by and then allege error upon a decision not necessarily intended to involve the point. Under all the circumstances developed on the trial the case does not show conclusively as a matter of law that the time was unreasonable, and if it did, the point would not be available without an exception.

The plaintiff was not bound to prove damages. It was a part of the agreement that the defendant would refund the money paid for the bonds, and the authorities are quite decisive, that the party has a right to demand the consideration. It may be that when the seller refuses to accept a return, the purchaser may dispose of the property and bring his action for the deficiency, but even if he has that right he may bring the action for the purchase-money as upon a rescission of a contract. The decision in 2 Johnson's Cases, 253, was to this effect; and the observations of the court illustrating the point

## Statement of case.

decided could not have been intended to lay down a different doctrine. The receipt of the amount of two coupons was, from the nature of the property, contemplated by the parties and was properly allowed by the General Term, but such receipt would not affect the right of recovery. Nor was the amount the plaintiff sold the bonds for, or that he paid on receiving them back, of any moment. It had no bearing upon the right of the plaintiff under his contract with the defendant. He was obliged to account for the amount he received on the coupons as for the contemplated use of the property, but any profit in the transaction, if there was any, stands upon a different footing and cannot be regarded as any part of the property to be returned. (70 Penn., 56 ; 4 Comst., 249.)

The judgment must be affirmed.

All concur.

Judgment affirmed.

ROBERT H. FISHER et al., Appellants, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondents.

Under the provisions of the act of 1813, "to reduce several acts relating particularly to the city of New York to one act" (§ 88, chap. 86, Revised Laws of 1813), the omission of the city corporation to pay an award for land taken for widening a street, within four months after confirmation of the report of the commissioners of estimate and assessment, does not alone give a right of action for its recovery; there must be in addition an application to the city for payment after the expiration of the four months, by the party entitled thereto.

The statute of limitations, therefore, does not commence to run against such a cause of action until application is so made.

Under said act, until the confirmation of the report of said commissioners, no lien is created by the proceedings upon land assessed.

The inability to find an order of confirmation is not conclusive evidence that no such order was made. It is competent to establish it by other proof.

It *seems*, that an entry made by the corporation attorney, in his register, of the making of such order is, after his death, admissible to prove that fact.

67	73
109	589

67	73
121	18

67	73
122	(30)

67	73
127	64

## Statement of case.

A copy, however, of an entry made in the register of an attorney, whose death is not proved, is not competent.

As to an assessment made under said act, prior to the Code, a presumption of payment, attached after twenty years from the entry of the order of confirmation, which presumption can only be rebutted by proof of actual payment of a portion thereof within twenty years, or by a written acknowledgment of indebtedness or liability; proof that the assessment has not, in fact, been paid does not rebut the statutory presumption.

*Fisher v. The Mayor, etc.* (8 Hun 64) reversed.

(Argued September 26, 1876; decided October 3, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury. (Reported below, 3 Hun, 64.)

This action was brought to recover a balance alleged to be due upon an award made in 1860 for lands of plaintiffs, taken for the widening of Worth street, in the city of New York. The answer set up the statute of limitations, and also set up an unpaid assessment upon the premises, to the amount of the balance unpaid of the award imposed upon the same lands for widening Center street. Plaintiffs replied, among other things, denying that said assessment remained due and unpaid, and alleging that the then owner of the premises paid the same, but that it was illegally assessed, and after its illegality was discovered, defendant voluntarily returned and refunded the amount so paid.

The facts are sufficiently set forth in the opinion.

*Philip S. Crooke* for the appellants. Plaintiff's claim was not barred by time. (Laws 1860, chap. 379; Laws 1868, p. 2022; 47 N. Y., 519.) The assessment of 1837 was barred by time. (2 Greenl. Ev., 528; 1 id., 39; *Dambman v. Schulting*, 4 Hun, 50; *Bates v. Rosencrans*, 37 N. Y., 409; *Devlin v. Bevins*, 22 How. Pr., 209.)

*D. J. Dean* for the respondent. The assessment of 1837 was not barred by time. (*Stewart v. Smith*, 14 Abb., 75;

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Opinion of the Court, per ANDREWS, J.

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*Henderson v. Henderson*, 3 Den., 314; *Pattison v. Taylor*, 8 Barb., 250; *Mayor v. Colgate*, 2 Kern., 148, 157; *Heyer v. Pruyn*, 7 Paige, 456; *Wilcox v. Fitch*, 20 J. R., 472.) The action was barred by the statute of limitations. (Code, § 91; *Lake v. Trustees of Wmsburgh*, 4 Den., 520; *McCullach v. Mayor, etc.*, 23 Wend., 458; *Richardson v. City of Brooklyn*, 34 Barb., 570; *Beard v. City of Brooklyn*, 31 id., 142; *Hunt v. Utica*, 8 N. Y., 442; *Buck v. Lockport*, 6 Lans., 251.)

ANDREWS, J. The cause of action to recover the balance of the award for land of the plaintiff's taken for the widening of Worth street, was not barred by the statute. The report of the commissioners of estimate and assessment was confirmed September 27, 1860, and this action was commenced December 22, 1869. By section 83 of chapter 86 of the Laws of 1813, it is made the duty of the mayor, aldermen and commonalty, within four calendar months after the confirmation of the report of the commissioners, to pay the awards made, and in case of neglect or default of payment within that time, it is declared that the "respective person or persons, or party or parties, in whose favor the same shall be so reported, his, her, or their executors, administrators or successors, at any time or times, *after application first made* by him, her or them, to the mayor, aldermen and commonalty, in common council convened, for payment thereof, may sue for and recover the same with lawful interest, from and after the said application therefor."

The omission of the mayor, aldermen and commonalty to pay an award within four months after the confirmation of the report, does not alone give a right of action for its recovery. There must, in addition, have been an application to the city for payment, after the expiration of the four months, by the party entitled, before the right of action accrues. This is the plain reading of the statute, and the object of the provision requiring application for payment to be first made was to afford the city an opportunity, after its attention had by a demand been particularly called to the subject, to pay the award without being subjected to the costs of litigation.



The demand in this case was not made until a short time before the commencement of the action, and the statute of limitations is not a defence to the plaintiff's claim.

The city, in addition to the statute of limitations, interposed as a defence a right to retain the unpaid balance of the award to satisfy a lien alleged to exist in its favor upon the same land for an assessment made in 1837 for benefits in the matter of widening and extending Center street. It was shown by records produced from the files of the clerk's office that proceedings were instituted in 1835 by the mayor, aldermen and commonalty under the act of 1813, and other statutes on the same subject, to widen and extend Center street. The court, upon petition duly made, appointed commissioners of estimate and assessment who took the steps required by the act, and made their report January 4, 1837, in which they assessed the lands of James Fisher the ancestor of the plaintiffs, for benefits in the sum of \$990, these being the same lands subsequently in 1860 taken for the widening of Worth street, and in respect to which the award was made, upon which this action is brought. But no order of the court confirming the report of the commissioners of estimate and assessment, in the matter of widening Center street, was produced, and it was admitted that after diligent search in the proper clerk's office, no order of confirmation could be found. Until confirmation of the report of the commissioners of estimate and assessment, no lien is created by the proceedings. The act provides that on the coming in of the report, the court shall by rule or order, after hearing objections, either confirm it or refer it back to the same commissioners for revision and correction, or to new commissioners to reconsider the subject matter thereof, and on the coming in of the second or other subsequent report, may refer it back in like manner "from time to time until a report shall be made and returned in the premises, which the said court shall confirm," and such report, the statute declares "when so confirmed shall be final and conclusive as well upon the mayor, etc., as upon the owners, lessees, persons and parties interested in and entitled

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Opinion of the Court, per ANDREWS, J.

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to the lands, etc., mentioned in the report, and also upon all other persons whomsoever." (§ 178.)

The order of confirmation is the final and decisive proceeding. Until that is made the rights of the parties are not fixed; the title of the owners of the lands taken for the improvement is not divested, and no charge or lien is created upon the land assessed. All the proceedings prior to the confirmation are provisional merely. But the inability to find an order of confirmation was not conclusive evidence that no order was made, and it was competent for the defendant to establish the fact by other proof. For this purpose, among other things, a copy of an entry in the official register of the corporation counsel, at the time, was admitted in evidence, as follows: "Widening and extending Center street; Charles Dusenbury, Abraham Dally, John B. Thorpe, 1835, June 6. Commissioners appointed: 1837, June 4. Report confirmed."

Entries made by third persons in the usual course of professional employment contemporaneously with the transaction recorded, are admissible to prove the fact stated, after the death of the person by whom the entry was made. (*Doe v. Tinford*, 3 B. & Ad., 898; *Brewster v. Doane*, 2 Hill, 537.) The entry by an attorney in his register of the making of an order or decree in a proceeding conducted by him, is admissible within this rule. The order or decree is the act of the court, but it is procured upon the application of the attorney, and the fact of obtaining it is a part of the history of the proceeding, which properly and usually is inserted in the register. There is no absolute duty resting upon an attorney to make such an entry, but this is not essential, it is sufficient if the entry was the natural concomitant of the transaction to which it relates, and usually accompanies it. (1 Green. Ev., § 115; *Leland v. Cameron*, 31 N. Y., 115.) The facts and circumstances proved independently of the entry, rendered it probable that an order of confirmation was made, and in connection therewith the original entry of the corporation counsel, was after his death, admissible secondary evidence of the fact. But the entry admitted in this case was not the original entry,

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Opinion of the Court, per ANDREWS, J.

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and it was not shown that the person who made the entry was dead. On both grounds the evidence was incompetent.

But, assuming that the assessment of 1837 was valid, the presumption of payment had attached prior to the making of the award to the plaintiffs in 1862, and was not rebutted by any facts or circumstances proved on the trial, and the claim to deduct it from the award should for that reason have been disallowed.

By section 186 of the laws of 1813, the sum assessed for benefits is made a lien or charge on the lands against which the assessment is made, and in default of payment on demand by the owner, occupant or person interested therein, the mayor, aldermen and commonalty, or any five of them, of whom the mayor or recorder may be one, are authorized by warrant, issued under their hands and seals, to levy the same from and after thirty days from the confirmation of the report, by distress and sale of the goods and chattels of the owners, etc., or the same may be recovered by action of debt or assumpsit in behalf of the corporation. The 222d section declares that assessments made by virtue of the act "may be sued for and recovered, with costs, in like manner as if the said houses and lots were mortgaged to the mayor, aldermen and commonalty for the payment thereof," and that they shall be entitled to a "preference before all other incumbrances."

In the *Mayor v. Colgate* (12 N. Y., 140), these provisions of the act came under the consideration of the court. That action was commenced in 1851, to enforce the lien of an assessment made in 1839, upon the lands of the defendants, and a decree was obtained for the sale of the premises to pay the assessment. The defendant interposed as a defence the six years' statute of limitations, under the provision of the Revised Statutes, subjecting to that limitation "all actions of debt founded upon any contract, obligation or liability not under seal, excepting such as are brought upon the judgments or decrees of some court of record of the United States, or of this or some other State." (2 R. S., 296, § 18, sub. 1.)

Opinions were delivered by GARDNER and DENIO, JJ.

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Opinion of the Court, per ANDREWS, J.

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Both concurred in the opinion that the action was not barred, and that the right to enforce the lien continued for twenty years from the time of the assessment. GARDNER, J., was of opinion that the order of confirmation was in the nature of a judgment, and that the rule applicable to an action on a judgment applied to the case; and DENIO, J., places his opinion on the ground "that the assessment is to be considered as in effect a mortgage, as well in regard to the time of commencing an action upon it as in other respects." There was no question but that the action was subject to some limitation and the court concurred in the result which was reached in both opinions that the limitation was twenty years. This must be regarded as a decisive adjudication of this question.

It is immaterial in this case whether the assessment when confirmed, is regarded as a judgment or a mortgage upon the lands assessed, as the rights of these parties are the same whichever view may be taken. The defendant's right of action to recover the assessment for the widening of Center street accrued in 1837, and the lien upon the lands assessed attached at the same time, a period twenty-five years before the award of 1862, and more than thirty years before the commencement of this action. The cause of action for the assessment of 1837, having accrued before the Code, the case, in respect to the question of limitation is governed by the Revised Statutes. (Code, § 73; *Appleby v. Brown*, 24 N. Y., 143.) Section 47, part 3, title 1, chapter 5 of the Revised Statutes declares that every judgment, etc., "shall be presumed to be paid and satisfied after the expiration of twenty years from the time of filing such judgment and decree," etc., but "such presumption may be repelled by proof of payment or of written acknowledgment of indebtedness made within twenty years, of some part of the amount recovered by such judgment or decree; in all other cases it shall be conclusive." By section 48, the right of action on a sealed instrument is presumed to have been extinguished by payment after the expiration of twenty years from the time it accrues, but may be repelled, the section declares, by proof of payment of some

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Statement of case.

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part, or "by proof of a written acknowledgment of such right of action within that period."

If the assessment under the act of 1813 is regarded as a judgment, section 47 applies to it; if a mortgage, then section 48 is applicable. In either case the presumption of payment which attaches after twenty years can be rebutted only in one of two ways, *first* by proof of actual payment of part of the claim, or *second*, by a written acknowledgment of indebtedness, or of the right of action. Neither of these facts exists in this case. There was no part payment of the assessment, and no written acknowledgment of liability. Proof that in fact the assessment had not been paid, does not rebut the presumption raised by the statute. It is conclusive unless rebutted in one of the two ways mentioned. (See *Morey v. Farmers' Loan and Trust Co.*, 14 N. Y., 302.)

If the defence, that the defendant had the right to retain the balance of the award to satisfy the assessment of 1837, can be regarded as a counter-claim, and a reply was necessary, we are of opinion that payment was sufficiently averred in the reply. Because this averment was coupled with other allegations which were irrelevant, does not prevent it from being treated as a reply of payment simply, and this was a proper reply to enable the plaintiff to avail himself of the statute presumption, to defeat the claim of the defendant founded on the assessment. (*Henderson v. Henderson*, 3 Den., 314.)

The judgment should be reversed, and a new trial ordered.

All concur.

Judgment reversed.

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GEORGE P. GIFFORD, Respondent, v. RHINALDO W. WATERS et al., Appellants.

Defendant's firm employed plaintiff, as clerk, for a specified period, agreeing to pay him for his services a certain proportion of the profits of the business, he being entitled to receive on account of his salary thirty-five dollars per week. Defendant, without good cause, discharged plaintiff before the expiration of the time fixed. In an action to recover damages for breach of the contract no evidence was given showing profits. The

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Statement of case.

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referee allowed plaintiff thirty-five dollars per week for the unexpired time. *Held*, no error; that by defendant's action plaintiff was prevented from assisting, by his services, in making profits, or from proving what they would have been, and, in the absence of evidence that profits could not have been earned had he been allowed to continue in defendant's employment, they were not in position to claim that no profits would have accrued; that, therefore, as the damages could not be based upon proof of profits, and as the contract fixed the minimum estimate of the value of plaintiff's services, this furnished a criterion from which the damages could fairly be estimated.

(Argued September 20, 1876; decided October 31, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought to recover damages for breach of a contract of employment.

On the 29th June, 1872, defendant's firm, R. M. Waters & Co., entered into a written agreement with plaintiff and two others, employing them as clerks for said firm for one year, and agreeing to pay them, as salaries, for their services, a sum equal to one-quarter of the net profits of the business exclusive of said salaries, of which plaintiff was to receive seven-fifteenths. It was also agreed that plaintiff should be entitled to receive on account of his said salary a sum not to exceed thirty-five dollars per week. This agreement was continued by parol for another year. The referee found that defendants on the 6th December, 1873, discharged plaintiff from said employment, and prevented and prohibited him from performing his agreement "without good or sufficient cause or reason of any kind whatever." No evidence was given on the part of plaintiff of profits, and he abandoned all claims for an accounting. Defendant's evidence tended to show that no profits were made. The referee allowed as damages thirty-five dollars per week for the unexpired term of the employment. Further facts appear in the opinion.

*W. H. Arnoux* for the appellants. The referee erred in refusing to find that plaintiff was not to receive a fixed salary,

## Opinion of the Court, per MILLER, J.

but a sum proportioned to and conditioned upon the profits of defendants' business. (*Clark v. Gilbert*, 26 N. Y., 279; *Loomis v. Marshall*, 12 Conn., 78; *Seacord v. Burling*, 5 Den., 444-446; *Baxter v. Rodman*, 3 Pick., 435; Ad. on Con. [7th Eng. ed.], 299, 667, 709; *Waters v. Earl of Mavet*, 2 Q. B., 757; *Hammond v. Smith*, 33 Beav., 452; *Bull v. Price*, 5 M. & P., 2; 7 Bing., 237; *Alder v. Boyle*, 4 C. B., 635; *Simpson v. Lamb*, 17 id., 603-616; *Williams v. Smith*, 4 Ill., 524; *Morgan v. Birnie*, 9 Bing., 672; 3 M. & S., 76; *Dobson v. Hudson*, 1 C. B. [N. S.], 667; *Owen v. Lavine*, 14 Ark., 389-396; *Atkinson v. Monks*, 1 Cow., 691-707; *Considerant v. Brisbane*, 14 How., 487; *Broad v. Thomas*, 7 Bing., 99; *Green v. Mules*, 30 L. J. C. P., 343-345; *Worden v. Dodge*, 4 Den., 159; *Salter v. Ham*, 31 N. Y., 328.) Plaintiff can only recover the compensation provided for by the contract. (Smith's Mer. Law [8th Eng. ed.], 415; Ad. on Con. [7th Eng. ed.], 968; *Munro v. Butt*, 8 El. & B., 738; *Runger v. Gt. W. R. R. Co.*, 5 H. L. Cas., 115; *Franklin v. Robinson*, 1 J. Ch., 157; *Read v. Raun*, 10 B. & C., 440, 441; *Broad v. Thomas*, 7 Bing., 99; *Roberts v. Smith*, 4 H. & M., 315-320; *Taylor v. Brewer*, 1 M. & S., 290; Whart. on Ag., § 324; *Reeve v. Reeve*, 1 F. & F., 280; *Blanchard v. Coolidge*, 22 Pick., 151; *Bull v. Price*, 237; *Caine v. Horsfall*, 519-523; *N. Y. Ins. Co. v. Robinson*, 1 J. R., 616; *Cartledge v. West*, 2 Den., 378; *Collender v. Dinsmore*, 55 N. Y., 200-210.

*W. I. Butler* for the respondent.

MILLER, J. By the contract between the parties, the defendants agreed to pay the plaintiff and two others, as a salary for their services, a sum which should be equal to one-quarter of the net profits of the business, exclusive of the salary to be divided between them in proportions specified in the contract. The contract also provided that the plaintiff should be entitled to receive on account of the said salary not to exceed the sum of thirty-five dollars per week, as a minimum estimate of the

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value of the services. The plaintiff claims damages for a breach of the contract, by reason of the defendants preventing him from performing the same, and the referee found that the defendants discharged the plaintiff from his employment by them before the time fixed for the determination of the plaintiff's services, and prevented and prohibited him from performing the said agreement, or from rendering any services whatever in his said employment without good or sufficient cause or reason, and refused to perform the terms of the agreement. It was, therefore, the fault of the defendants that the plaintiff did not fulfill the contract. They refused to allow this to be done, and in consequence of their action no opportunity was furnished to the plaintiff by services rendered to assist in making the profits, of which he was to receive a proportionate share. Even if no profits had been realized up to the time of the plaintiff's discharge, it is no defence to the plaintiff's claim for damages; for it was not made to appear upon the trial that such profits might not have been earned if the plaintiff had been allowed to continue in the defendants' employment until the close of the period fixed for the termination of the contract. The plaintiff, therefore, was not to blame because no profits were earned, and upon the facts presented was lawfully entitled to indemnity for all losses sustained by reason of the failure of the defendants to fulfill the contract. Such losses could not be determined by proof of profits, because the act of the defendants had deprived the plaintiff of an opportunity to furnish any such evidence, and after having done this they are not in a position to claim that no profits would have accrued if the contract had been fulfilled. They cannot thus relieve themselves from liability. If they had discharged the plaintiff and then discontinued the business entirely, thus preventing any future profits, it would be no answer to a claim for remuneration that there were no profits. They stand precisely in this position in the case at bar, and are not relieved from it by the fact that without the plaintiff's services, his aid and assistance, they did not make any profits. It must be assumed



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from the evidence and the findings of the referee, that the plaintiff was injured by the breach of the contract, and as the defendants have fixed a definite value upon the plaintiff's services, if he had been allowed to continue to perform the same according to the contract by providing for the payment of a specific sum weekly, they have furnished a criterion from which the damages may be fairly estimated. They thereby assented to this amount as a minimum estimate of the value of the plaintiff's services, and it may properly be considered as a reasonable compensation for the same for the period during which he remained unemployed under the contract and as none other can be furnished in consequence of the defendants' act, this sum was properly adopted by the referee as the true measure of damages. If the views expressed are correct, then the request to find that the plaintiff was not to receive for his services, under the said agreement, any salary or compensation at a fixed or absolute sum, but a sum proportional to and conditional upon the profits of the business of the defendants, and not otherwise, was immaterial and could not affect the case. Nor can any other question presented affect the disposition of the case made by the referee.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

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THE UNION DIME SAVINGS INSTITUTION v. JOSEPH W. DURYEA et al. GIBBONS L. KELTY et al., Respondents, and HENRY C. BISPHAM, Appellant.

Under the provision of the Code (§ 282), authorizing the court where, upon appeal from a judgment, an undertaking requisite to stay execution has been given, to exempt by order from the lien of such judgment real estate upon which it is a lien, and to direct an entry on the docket of judgment that it is "secured on appeal," and declaring that thereupon such judgment shall cease, during the pendency of the appeal, to be a lien upon the property so exempted "as against purchasers and

## Opinion of the Court, per EARL, J.

mortgagees in good faith," one who has, during the pendency of the appeal, taken a mortgage "in good faith" upon property so exempted, in payment of an antecedent debt, is protected, and his mortgage has a preference over the judgment.

It is not necessary for him to show that he parted with value on the faith of the mortgage.

*Weaver v. Barden* (49 N. Y., 286) and *Cary v. White* (52 id., 138) distinguished.

(Argued September 20, 1876; decided October 3, 1876.)

APPEAL on the part of defendant, Henry C. Bispham, from order of the General Term of the Supreme Court, in the first judicial department, reversing an order of Special Term, respecting the distribution of surplus money arising upon a foreclosure sale in this action. (Mem. of decision below, 3 Hun, 210.)

The facts sufficiently appear in the opinion.

*Benj. T. Kissam* for the appellant.

*Alexander Ostrander* for the respondents. The respondents were *bona fide* holders of the mortgage for a valuable consideration. (*Cary v. White*, 52 N. Y., 138; *Weaver v. Barden*, 49 id., 286; *King v. Harris*, 34 id., 330; *Brown v. Leavitt*, 31 id., 113; *Wood v. Obessin*, 13 id., 509; *Wood v. Robinson*, 22 id., 564; *Boyd v. Cummings*, 17 id., 101; *Ayrault v. McQueen*, 32 Barb., 305; *Stettheim v. Meyer*, 33 id., 215; *Caldwell v. Hicks*, 37 id., 458; *Padgett v. Lawrence*, 10 Paige, 170; *Peck v. Mallams*, 10 N. Y., 545; *Lawrence v. Clark*, 36 id., 128; *Bk. of N. Y. v. Vandervoort*, 32 id., 553.) The appellant's lien, which was suspended when the docket of his judgment was marked "secured on appeal," was not restored by the order for a new trial as against respondents. (*King v. Harris*, 34 N. Y., 330; *Weaver v. Barden*, 49 id., 286; *Cary v. White*, 52 id., 138.)

EARL, J. This is a controversy about surplus money arising upon the foreclosure of a mortgage. The important facts are as follows: May 1, 1871, the defendant Allen conveyed the

land to the defendant Keech, subject to the mortgage foreclosed, and took back a mortgage for a portion of the purchase-money. March 17, 1873, defendant Bispham recovered a judgment against Keech for upwards of \$1,200, which was on the same day docketed in the county clerk's office. From this judgment Keech appealed and gives the usual undertaking upon the appeal. July 28, 1873, an order was made by the court directing an entry to be made on the docket, "secured on appeal," and the entry was so made October 15, 1873. While the docket was thus marked and the appeal was pending, Keech executed a mortgage on the land for upwards of \$1,200 to the defendants Kelty & Co.

A reference was made to ascertain the rights in the surplus money, and the above facts appeared. All parties conceded that the Allen mortgage should be first paid, and Bispham and Kelty & Co. each claimed a preference in the balance. The referee decided against the claim of preference made by Bispham, and he filed exceptions which were sustained at Special Term. Kelty & Co. appealed to the General Term and there the order of the Special Term was reversed, and the decision of the referee affirmed, thus giving the mortgage of Kelty & Co. preference over the judgment of Bispham.

The decision of the General Term is clearly right. The Code (§ 282), provides that where there has been an appeal from a judgment, and an undertaking requisite to stay execution shall have been given, the court may, upon motion, by order exempt from the lien of the judgment the real property upon which the judgment is a lien, and in such case direct the entry, "secured on appeal," to be made in the docket, and that "thereupon such judgment shall cease during the pendency of such appeal to be a lien upon the property so exempted as against purchasers and mortgagees in good faith." The respondents having taken their mortgage while the judgment was thus secured and the judgment debtors' real estate exempted from its lien, they are protected if they took their mortgage *in good faith*. It was not requisite for them to have parted with value at the time, provided they took their mortgage

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fairly and honestly, and for full value. That they acted in good faith is not questioned, and their antecedent debt furnished a good and full consideration. There are cases arising under the recording acts and cases in which a purchaser of property seeks the protection of a court of equity as against the legal title or a prior equity, where the party must show not only that he is a purchaser in good faith, but for value actually parted with on the faith of the purchase, and in such cases a mere precedent debt does not ordinarily furnish a sufficient consideration. (*Weaver v. Barden*, 49 N. Y., 286; *Cary v. White*, 52 id., 138.) But here Bispham did not have any legal or equitable right as against a class of persons to which the respondents belonged. The object of the statute was to permit the judgment debtor in such a case to deal with his property as if the judgment had never been a lien thereon, upon the sole condition that the purchaser or mortgagee shall act in good faith.

Other suggestions contained in the brief submitted on the part of the appellant have been duly considered, and they are either wholly groundless, or were in no form made in the court below.

It follows that the order must be affirmed, with costs.

All concur.

Order affirmed.

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DOUGLAS TAYLOR, Appellant and Respondent, v. THE MAYOR,  
ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,  
Appellant and Respondent.

The provision of the act of 1869 providing for the government of the county of New York (§ 7, chap. 875, Laws of 1869) which prohibits the board of supervisors of said county from increasing salaries, "except as provided by acts of the legislature," does not apply where the legislature has expressly authorized said board to increase the salary.

Accordingly, *held*, that a resolution of said board passed December 28, 1869, under the authority of the act of 1855, in relation to the salaries of certain judicial officers (§ 1, chap. 575, Laws of 1855), authorizing it to increase the salaries of the city judge and other officers, which reso-

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lution increased the salary of the city judge to \$15,000 a year, to take effect January 1, 1870, was valid; and that under the provision of the act of 1870 relating to jurors for the city and county of New York (§ 17, chap. 539, Laws of 1870), providing that the salary of the commissioner of jurors "shall be at the same rate as the salary paid to the city judge," the said commissioner was entitled to a salary of \$15,000 per annum.

Also, *held*, that the act of 1872 (chap. 367, Laws of 1872) confirming said resolution was not controlling to show that the resolution was invalid prior thereto, but was in the nature of a declaratory act.

Also, *held*, that the fact that the city judge, either by accident or design, was not actually paid at the rate of \$15,000 after January, 1870, did not affect the rights of said commissioner of jurors; the intent was to give him the salary the city judge was entitled to, and whether the latter officer received it or not was immaterial.

Prior to the passage of the city charter of 1873 (chap. 335, Laws of 1873) the office of commissioner of jurors was not a city office, and the provision of said act (§ 97) authorizing the board of apportionment to reduce the salary of all officers paid from the city treasury, "whose offices *now* exist," did not apply to such office, as it only included city offices then existing, not those made city offices by the act itself.

Accordingly, *held*, that a resolution of the board of apportionment fixing the salary of said commissioner at \$5,000 on July 1, 1873, was invalid.

*It seems*, that a resolution of the board of apportionment that the salary of a city officer "be fixed" at a less sum than that theretofore paid has the effect to reduce the salary, the same as if the word "reduce" had been used in the resolution.

Plaintiff, who at the time of the passage of said charter of 1873 was commissioner of jurors, continued to discharge the duties of the office after April 1, 1873, the time when, by the provisions of said charter (§ 117), his term of office expired, and up to April 1, 1874, no successor having been appointed, *held*, that this was to be regarded as a holding over under the provisions of the Revised Statutes (1 R. S., 117, § 9), and that plaintiff was entitled to his salary up to the time he ceased to act.

In an action against the city for an unpaid salary, interest is only recoverable from the time of demand.

(Argued September 21, 1876; decided October 8, 1876.)

THESE were cross-appeals from a judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The nature of the action and the facts are set forth sufficiently in the opinion.

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Opinion of the Court, per CHURCH, Ch. J.

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*A. Oakley Hall* for the appellant. When a statute respecting the salary of a public official admits of two interpretations, the construction should be favorable to the claims of the official. (*U. S. v. Morse*, 3 Story, 91.)

*David J. Dean* for the respondent. It was not the intent of the legislature that the salary of the commissioner of jurors should be dependent upon legislation, subsequently affecting the salary of the city judge. (*Quinn v. Mayor, etc.*, 63 Barb., 595; *Taylor v. Mayor, etc.*, 5 Daly, 488.) The regulation of salaries to be paid from the city treasury falls within the general subject of organizing the local government. (*In re Astor*, 50 N. Y., 367.) Plaintiff was a local officer and his salary might properly be the subject-matter of a local act. (*People v. McCann*, 16 N. Y., 58.) Plaintiff is only entitled to interest from the time of demanding payment of his claim. (*Darlington v. Mayor, etc.*, 31 N. Y., 193; *People v. Canal Comrs.*, 5 Den., 404.)

CHURCH, Ch. J. This action was brought to recover a sum claimed to be due the plaintiff for a portion of his salary as commissioner of jurors, from July 1, 1871, to April 1, 1874, and interest thereon, and also a sum for disbursements, over and above fines and penalties received by him. There seems to be no serious dispute in respect to the item for disbursements, amounting to \$2,605.16, but several questions arise as to the amount due the plaintiff for salary, and it must be confessed that the acts of the legislature and local authorities have very much complicated the question. The court below allowed the plaintiff a salary at the rate of \$10,000 a year. Both parties appealed, the plaintiff claiming \$15,000 a year, and the defendant claiming that the plaintiff is entitled to \$10,000 a year, to May 2, 1873, when his office terminated by act, chapter 335, of the Laws of 1872, section 117, but if he is deemed to have held over, until the 1st of May, 1874, that he is only entitled to \$5,000 a year, from July 1, 1873, the board of apportionment having reduced the salary to that amount.

By act chapter 575, of the Laws of 1855, the board of

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supervisors of the city of New York were authorized to increase the salaries of the justices of the Supreme Court, the judges of the Court of Common Pleas, the surrogate, recorder and city judge, or either of them. The board of supervisors, by resolution approved by the mayor on the 28th day of December, 1869, fixed the salary of the recorder and city judge at \$15,000 a year to take effect January 1, 1870. The act chapter 539 of the Laws of 1870, section 17, provides that "the salary of the commissioner of jurors shall be at the same rate as the salary paid to the city judge," etc. It was found by the judge at Special Term, that the salary of the city judge prior to January, 1870, was \$10,000, and that in point of fact he was paid only at the rate of \$10,000, from January 1, 1870, to July 1, 1870, and hence it is claimed that the act of May 2, 1870, fixed the salary of the plaintiff at that sum. It does not appear what the salary of the plaintiff was prior to that time. By an act, chapter 367 of the Laws of 1872, the resolution of the board of supervisors, above referred to, respecting the salary of the recorder and city judge, was ratified and confirmed from and after January 1, 1872, and all payments made thereunder and any amounts due and unpaid were confirmed and declared valid.

It is suggested that the action of the board of supervisors, fixing the salary of the city judge at \$15,000 a year, was invalid in consequence of the provision contained in the act, chapter 875 of the Laws of 1869, prohibiting the board of supervisors from increasing salaries, but the exception in the prohibitory clause, "except as provided by acts of the legislature," relieves the board from its operation in respect to these officers. We think the fair construction of this act is to prohibit an increase of salaries by the supervisors, except in those cases where the legislature had itself acted upon the subject. The legislature had expressly provided for an increase of the salaries of certain specified officers, and the action of the board in respect to these officers, was not included within the prohibition of the act. Otherwise it is difficult to give any effect to the exception. The confirmatory act of 1872 is not controlling.

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It was probably passed to remove any doubt upon the question, which may have been entertained by the officers themselves, or by the city authorities. It is in the nature of a declaratory act, and has no material bearing upon the question. It follows that the salary of the city judge, from January 1, 1870, was \$15,000, and the act of May 2, 1870, fixing the salary of the plaintiff "at the same rate as the salary paid to the city judge," would be decisive in fixing the salary of the plaintiff at that sum, except for the fact as found that the city judge between January and July, 1870, received only at the rate of \$10,000 a year. The evidence does not clear up the apparent mystery why the city judge was not paid during the first six months of 1870, at the rate of \$15,000 a year, when he was paid at that rate for the last six months, and, as I infer, before the confirmatory act of 1872 was passed. If he was entitled to be paid at the rate of \$15,000, the circumstance that it was not paid to him, either by accident or design, cannot impair the force of the act of May 2, 1870, which, in effect, places the plaintiff upon an equality with the city judge. If the city judge had not in fact received any thing, the argument for the defendant would go the length of depriving the plaintiff of any salary. The evident meaning of the statute of May 2, 1870, is to give the plaintiff the same salary which the city judge was entitled to receive, and whether he ever did receive it, is of no moment. If he did not he is still entitled to it. It is not the actual fact of payment, but the rate authorized to be paid, which is the test. The legislature presumably understood what rate of salary was provided to be paid to the city judge, and to have passed the act with reference thereto, and not upon the unauthorized neglect of the city authorities, in omitting to pay, or the voluntary action of the city judge in omitting to demand full payment.

The case of *Quinn v. The Mayor* (63 Barb., 595) is not adverse to these views. Thereafter the common council, under color of statutory authority, fixed the salary of the police justices at \$10,000 a year and the same was being regularly paid. No question of legality having been raised, the



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legislature authorized the mayor and comptroller to fix the salaries of the civil justices at a sum "not exceeding the salary *now paid* to the police justices of said city." FANCHER, J., in delivering the opinion of the court, held that the legislature intended to act upon the existing fact of payment, under apparent lawful authority that it was a question of legislative intent, and that the strict legal validity of the action of the common council in fixing the salary of the police justices was not presented, nor within the contemplation of the legislature in conferring authority upon the mayor and comptroller to fix the salaries of the district justices, and the legal question was not considered or passed upon. It is a question of legislative intent in this, as in that case, and after the legislature had authorized the board of supervisors to increase the salary of the city judge, and the board had so increased it in pursuance of such authority, to \$15,000, and the legislature then declared that the commissioner of jurors should have a salary at the same rate as that paid to the city judge, the intent to fix his salary at that sum is apparent, and the omission to pay or receive the whole or any part of that amount throws no light upon the question of intent, especially as that amount was actually paid after the first six months of 1870, under the same authority.

It is not disputed that the plaintiff continued to discharge the duties of the office after the passage of the act of 1873, for the time for which he claims a salary, and he must be regarded as holding over under the provisions of the Revised Statutes. (1 R. S., 117, § 9.)

The effect of the action of the board of apportionment in fixing the salary of the plaintiff at \$5,000, on the 1st of July 1873, is not free from difficulty. The charter of 1873 (§ 97) reads as follows: "The salaries of all officers paid from the city treasury, whose offices now exist, but are not embraced in any department, shall be paid by the board of apportionment. Such board may, by a majority vote, reduce any such salaries, but shall not increase the salary of any office the compensation of which now exceeds \$3,000."

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Opinion of the Court, per CHURCH, Ch. J.

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I am unable to concur with the *argumenti gratia* of the learned counsel for the plaintiff that the resolution of the board of apportionment declaring that the salary of the plaintiff "be fixed at the rate of \$5,000," was not appropriate in terms under the provision above quoted. The first resolution that the salary be "reduced and fixed" at \$6,000 was passed and reconsidered when the resolution *fixing* the salary at \$5,000 was passed. In respect to salaries which had been *fixed* theretofore, a resolution employing the words "reduce" or "fix" would accomplish the same result. The board had power to fix salaries in cases where they had not been before fixed, and to reduce existing salaries, but to declare a salary *fixed* at a specified sum which was less than the amount before allowed is as perfectly a reduction of the salary as if that word was employed.

A more serious question is whether the office of commissioner of jurors, as it existed at the time of the passage of the charter of 1873, was embraced within the terms of section 97 before quoted. We have recently decided in the case of *Whitmore v. The Mayor* (not reported)\* in affirmance of the General Term of the first department, that section 97 was intended to apply only to city officers; that the plaintiff in that case being a clerk of the District Court was not such, and that the section did not apply to him. It is important, therefore, to inquire whether the plaintiff in this case was at that time a city officer. In the recent case of *Taylor v. Dunlap* (not reported)† ANDREWS, J., in delivering the opinion, expressed a doubt whether the commissioner of jurors was "distinctively" a county officer, but held that if he was, the office and its functions were of such a character that it was competent for the legislature to make it strictly a city office and that by the charter of 1873, the legislature did make it a city office, and that provisions for that purpose in the act of 1873, were not foreign to the subject expressed in the title, and were not therefore unconstitutional. It is evident from the opinion that the court decided the case upon this ground. This act

\**Ante*, p. 21.

† 66 N. Y., 162.

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changed the mode of appointment from the supervisors and judges to the mayor and common council, and intended that it should be from that time a city office. Prior to this time I do not think, looking at the mode of appointment and removal as well as the duties and functions pertaining to it, that it can be regarded as a charter office proper, and I concur with the General Term, that the clause quoted of the act of 1873, did not embrace that officer. It embraced all city offices "now existing," which would not include a city office created by that act.

The plaintiff not being a city officer at the time the act was passed, was not included although the act made him so. It follows that the action of the board of apportionment in attempting to reduce the salary of the plaintiff to \$5,000, was unauthorized and invalid. My conclusion therefore is that the plaintiff was entitled to a salary of \$15,000 a year.

The question of interest remains to be considered. The defendants, I think, are correct in the legal position that interest can only be claimed from the time of demand. The city government is not required to seek out those who have claims against it, and pay them even when due. It is to be presumed that all proper liabilities will be paid upon demand. The charter prohibits any action against the city until thirty days after the claim has been presented to the comptroller. There was no evidence on the subject of a demand on the trial. It seems to have been assumed that a demand had been made from time to time.

After the trial upon the settlement of the case the judge was requested to find that no demand had been made, which was refused, on "the ground that no question as to the interest or the presentation of said claim was made on the trial of the action."

Under these circumstances I do not think the defendant is at liberty to urge the question here, but as there must be a new trial the interest can be properly adjusted at that time.

A new trial must be granted, costs to abide the event.

All concur.

Judgment reversed.

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Statement of case.

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GEORGE COLGROVE, Appellant, v. CHARLES TALLMAN,  
Impleaded, etc., Respondent.

Where one of two copartners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes in equity the principal debtor and the latter a surety; and this relationship a firm creditor having notice of the agreement is bound to observe.

Where a creditor, having such notice, is requested by the partner, who thus became surety, to collect his claim, and he refuses or neglects so to do, if, at the time of the request, the principal was solvent and able to pay, but thereafter becomes insolvent, the surety is discharged.

(Argued September 21, 1876; decided October 8, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the fourth judicial department, reversing a judgment in favor of plaintiff, entered upon the report of a referee, and granting a new trial. (Mem. of decision below, 5 Hun, 103.)

This was an action upon a promissory note, made by the firm of H. C. Barnes & Co., of which firm defendants were sole partners.

The note was given October 3, 1863, payable "fifteen days demand after date." About June 21, 1864, defendant, Tallman, sold out all his interest in the partnership property and effects to defendant Barnes, who agreed to assume and pay all the firm debts. A few days thereafter Tallman notified plaintiff, who then held the note, of the agreement, and requested him to proceed and collect the note, immediately. Barnes was, at the time, solvent and able to pay. He failed in 1866, made an assignment and was thereafter, up to the time of trial, hopelessly insolvent. Plaintiff made a demand in June, 1865, but made no effort to collect the note until after the failure.

*Charles Stevens* for the appellant. The original liability of partners to creditors of a firm continues after a dissolution

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thereof, without regard to agreement of dissolution. (Story on Part., chap. 8, § 158; Pars. on Part. [2d ed.], 437; *Smith v. Rogers*, 17 J. R., 340; *Winnie v. McCullough*, 1 Sandf. Ch., 370; *Vernam v. Harris*, 1 Hun, 451; *Morse v. Gleason*, 2 id., 31; 32 N. Y., 501.)

*D. Pratt* for the respondent. Tallman became the surety of Barnes for the payment of the debt in suit, and was entitled to all the rights of a surety. (2 Lans., 97; *Savage v. Putnam*, 32 N. Y., 501; *Millerd v. Thorn*, 56 id., 402; *Cornell v. Prescott*, 2 Barb. 16; *Kenney v. McCullough*, 1 Sand. Ch., 370; *Waddington v. Vredenburg*, 2 J. Cas., 227; *March v. Bike*, 10 Paige, 595; 13 Vt., 81; *Morse v. Gleason*, 2 Hun, 32; *Matthews v. Aikin*, 1 Com., 595; *Hayes v. Ward*, 4 J. Ch., 130; *Hodgesen v. Shaw*, 3 M. & K., 183; *Craythorne v. Swinburne*, 14 Ves., 150.) Any arrangement between the creditor and Barnes changing or modifying the original contract discharged Tallman. (*Bangs v. Strong*, 7 Hill, 250; *Grant v. Smith*, 46 N. Y., 93; *Guion v. Knapp*, 6 Paige, 25; *Reynolds v. Ward*, 5 Wend., 501; *Archer v. Douglass*, 3 Den., 512; *Bangs v. Mosher*, 23 Barb., 478; *Mantepoise v. Lloyd*, 15 C. B. [N. S.], 203; *Banks v. McDonald*, 3 H. L. Cas., 226; Story's Eq. Jur., 324-327; *Neinscewicz v. Gahn*, 3 Paige, 651; *Guion v. Knapp*, 11 Wend., 312, 323; 56 N. Y., 402; 2 Hun, 31.)

FOLGER, J. By the dissolution of the copartnership, of which Barnes and Tallman were the members, and the transfer of all the property to Barnes, and his agreement with Tallman to pay all the debts of the firm; Tallman became in equity, as between himself and Barnes, a surety, for Barnes as principal debtor in those debts. (*Millerd v. Thorn*, 56 N. Y., 402; *Savage v. Putnam*, 32 id., 501; *Kinney v. McCullough*, 1 Sandf. Ch. R., 370; *Morse v. Gleason*, 64 N. Y., 204.)

When it was made known to Colgrove by Tallman, that Barnes and Tallman had gone into the bargain, which was

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thus made between them, Colgrove became bound to Tallman in equity to observe it. Thus, if he had made with Barnes, a valid agreement to extend the time of payment of the note made to him by the firm, Tallman would have been discharged. (56 N. Y., *supra*.) This could be, only on the ground that extension of time of payment of a debt, granted by a creditor to a principal debtor, acts as a discharge of a surety of the debt, from his liability thereon.

It is recognized as resting upon this principle, in *Oakley v. Pasholes* (10 Bligh. New Par. R., 548). It was there argued for the creditor, that the doings of his debtors among themselves could not alter his rights, (page 580), and that a partner retiring, with an agreement for indemnity from his copartner, was not thereby converted into a surety, (page 581). But it was ruled that he was. The opinion given by Lord LYNDEHURST, in the House of Lords, is: That the representatives of the retiring partner stood in the character of sureties (page 590), which the creditor was bound to observe, having had notice of the dealings between the partners, his original debtors; and see *Morse v. Gleason* (*supra*), as bearing upon this point. It is urged here, that the consent of the creditor is needed to create these new relations between him and his debtors; but the English case above cited does not make that a necessary fact. Nor are there lacking other instances in the law, wherein the action of third parties among themselves, has changed the relations of the creditor to them, without his assent thereto, and has created equities in favor of all or one of them, which he was bound to regard, and to refrain from injuring by his action or omission. Thus, if the equity of redemption of mortgaged premises is sold on execution by a judgment creditor of the mortgagor, and then the mortgagee, having also a bond for his debt, seeks to enforce it out of property of the mortgagor other than the lands mortgaged, he will either be stayed, or forced to make over the debt and security to the mortgagor, so that he may save himself out of the premises. (Per KENT, Ch., *Tice v. Annin*, 2 J. Ch., SICKELS — VOL. XXII. 13

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125-8; see a kindred case, *Ferris v. Crawford*, 2 Denio, 595.) So, too, if a mortgagor conveys part of the mortgaged premises subject to the whole mortgage, the part sold is first liable for the debt, *i. e.*, it becomes the principal debtor; and the mortgagee must exhaust it before he can seek other property of the mortgagor, who has become in equity the surety. (*Halsey v. Reed*, 9 Paige, 446.) And what comes close to this case in principle, and shows that a creditor must care for equities growing from new relations, arising out of changes made without his assent, is this: If several lots are mortgaged, and after that have come to different owners, and the mortgagee releases some of them, he may not enforce against those not released, more than a proportionate amount of the mortgage debt; the creditor, says the chancellor, owes a duty to his debtors, not to impair their rights as against each other. (*Stevens v. Cooper*, 1 J. Ch., 425.) This rule has been reiterated, with the requirement that the creditor must have notice of the change sufficient to put him on inquiry. (*Howard Ins. Co. v. Halsey*, 8 N. Y., 271; and see *Guion v. Knapp*, 6 Paige, 35; *Stuyvesant v. Hall*, 2 Barb. Ch., 151.) The reason is, that the parcels sold have become as sureties to the parcels not sold. The latter are as principals. A release of them is as a release of a principal debtor, which discharges the surety. To the same end is the rule, that a creditor having a lien upon two funds, will be forced, in favor of an after lienor having a claim upon one of the funds only, to seek his debt from the other fund. (*Chesebrough v. Millard*, 1 J. Ch., 409.) And if he does aught to prejudice the claim upon the one fund of the after lienor, after notice of the lien, he will to that extent be cut off from his own claim upon that fund.

In equity, then, the relations of the parties to this case, are that Barnes is the principal debtor, Tallman his surety for the payment of the debt, and Colgrove their creditor, of one as the principal debtor, of the other as surety. These relations existed, as soon as Tallman gave notice to Colgrove, of the dissolution of the partnership and the agreement between him

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and Barnes. Each of them was, after that, affected by all the rules applicable to persons in those relations.

It is the settled law of this State, and one of the rules of the relations of creditor, principal debtor and surety, that the surety, while the principal is solvent and can be made to pay the debt, may require of the creditor that he collect it of the principal, and if the creditor refuses or neglects so to do, and the principal becomes insolvent and unable to pay, the creditor may not then have his debt of the surety; it is expressly so declared in *Pain v. Packard* (13 J. R., 174), *King v. Baldwin* (17 *id.*, 384), *Remsen v. Beekman* (25 N. Y., 552); and treated as settled in *Manchester Manufacturing Company v. Sweeting* (10 Wend., 163); and though questioned, yet not denied in *Warner v. Beardsley* (8 Wend., 194) and *Herrick v. Borst* (4 Hill, 650); limited in *Trimble v. Thorne* (16 J. R., 151), and by ANDREWS, J., in *Wells v. Mann* (45 N. Y., 327), so as not to include indorsers and guarantors by independent collateral contract; and recognized by CHURCH, Ch. J., in *Hubbard v. Gurney* (64 N. Y., 457).

And surely the reasons for the rule apply to the case in hand. We have shown that the relation of surety was created in Tallman. A surety is discharged in such case, because it is the duty of the creditor to obtain payment in the first instance of the principal debtor, and not of him who is surety; it is right that the principal should pay the debt; it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazard arising from a prolongation of the credit; and the creditor is under an equitable obligation to obtain payment from the principal, and not from the surety, unless the principal is unable to pay. (Per SPENCER, Ch. J., *King v. Baldwin*, *supra*; per WRIGHT, J., 25 N. Y., *supra*.) These reasons apply in full force here. Tallman had given up to Barnes, and put out of his own control all of the property of the firm, and had given Colgrove notice, and requested him to collect the debt. The facts of the case bring the parties within the rule above noticed, and set it in operation against the plaintiff.



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Statement of case.

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Upon this ground, without considering any other question in the case, the order of the General Term should be affirmed and judgment absolute rendered against plaintiff on stipulation, with costs.

All concur.

Order affirmed and judgment accordingly.

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**MOUNT A. YATES, Appellant, v. THE NEW YORK CENTRAL  
AND HUDSON RIVER RAILROAD COMPANY, Respondent.**

Where in an action against a railroad company for unlawfully ejecting a passenger from its cars, the case, as made by plaintiff, is one where punitive damages may be allowed, evidence on the part of the conductor that at the time he ejected plaintiff he believed that plaintiff had not surrendered a ticket entitling him to be carried, also, that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent upon the question of damages.

In order to present the point of the immateriality of the evidence on the question of compensatory damages, plaintiff's counsel should, when the evidence is offered, disclaim any claim for any further damages.

Where, in such an action, the verdict is for the defendant, the reception of erroneous evidence on its part, on the subject of damages, is not a ground for reversal, as it could not have produced any inquiry.

(Argued September 25, 1876; decided October 3, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of defendant, entered upon a verdict.

This action was brought to recover damages for being ejected out of the defendant's train.

The plaintiff gave evidence tending to show that he bought a ticket at Palatine Bridge for Utica and entered defendant's train; that before reaching Little Falls the conductor took up such ticket; that after leaving Little Falls and before reaching Utica, the conductor again demanded plaintiff's ticket, and because plaintiff did not show a ticket and refused to pay his fare, the conductor put him off the cars; that plaintiff offered

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Statement of case.

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to pay the fare before the bell was rung, but that the conductor refused to receive it; after plaintiff was put off, he again got on the cars while in motion, and was again put off with force, being kicked off.

On the part of the defence the evidence tended to show that the plaintiff had not surrendered a Utica ticket to the conductor; that he did not offer to pay his fare until after the bell was rung to stop the train, and that he got on the train after it had started, against the commands of the conductor.

Upon the trial the conductor of the train was permitted to testify, under objection and exception, that he honestly believed that plaintiff had not surrendered a ticket entitling him to be carried to Utica; also, that he believed it to be his duty to put plaintiff off the cars if he did not pay his fare. This evidence was allowed upon the question of damages only.

Further facts appear in the opinion.

*D. S. Morrel* for the appellant. Plaintiff was entitled to a verdict. (*English v. D. and H. Canal Co.*, 14 Alb. L. J., 83; *Macy v. Wheeler*, 30 N. Y., 231; *Lane v. Ill. and C. R. R. Co.*, 32 Iowa, 534; *Kline v. Pac. R. R. Co.*, 37 Cal., 400; 5 N. Y., 475; 23 id., 343; 47 id., 128; *Sanford v. Eighth Ave. R. R. Co.*, 23 id., 343; *Rounds v. D. L. and W. R. R. Co.*, 5 T. & C., 475.) Defendant in removing plaintiff was bound to do so in such a manner as not to endanger his personal safety. (37 Cal., 400; 23 N. Y., 346; 5 T. & C., 475, 480; 32 Iowa, 534.) The court erred in allowing the conductor to answer the questions as to whether, when he put plaintiff off the car, he believed he had not given up his ticket, and whether he believed it was his duty, under the circumstances, to put him off. (*Cook v. People*, 2 T. & C., 409; 43 N. Y., 279; *Greenl. Ev.*, § 441; 1 Barb., 537; 2 T. & C., 404, 408.) The court below erred in admitting this evidence upon the question of damages. (47 N. Y., 282; 53 id., 25; 56 id., 44, 296; 23 id., 343; 5 T. & C., 475; 52 Barb., 15; 2 G. & W. on New Trials, 611; 18 N. Y., 546; 45 id., 341; 21 Barb., 489; 58 id., 625.)

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Opinion of the Court, per CHURCH, Ch. J.

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*S. W. Jackson* for the respondent. Defendant had a right to expel plaintiff from its car. (Laws 1850, chap. 140, § 35; *People v. Jillson*, 3 Park. Cr., 234; *Hibbard v. N. Y. and Erie R. R. Co.*, 15 N. Y., 455; *Barker v. N. Y. C. R. R. Co.*, 24 id., 599; *Adwin v. N. Y. C. R. R. Co.*, 60 Barb., 590; *Townsend v. N. Y. C. and H. R. R. R. Co.*, 56 N. Y., 501.) Defendant was entitled to give evidence of mitigating circumstances. (*Millard v. Brown*, 35 N. Y., 300; *Corning v. Corning*, 6 id., 97; *Hamilton v. Third Ave. R. R. Co.*, 53 id., 25; 56 id., 298; *Brown v. Hoburger*, 52 Barb., 52.)

CHURCH, Ch. J. The charge of the court upon the facts is not given in the case. The presumption, therefore, is that the questions of fact were fairly and properly submitted to the jury.

The evidence was conflicting upon the principal fact involved and the jury were warranted in finding for the defendant, and their decision is conclusive. Nor is there any reviewable question presented arising out of the decision of the court prohibiting the plaintiff's counsel from commenting upon the circumstances that the defendant omitted to call the station agent at Palatine Bridge, where the plaintiff alleged that he purchased his ticket. The disposition of such incidental questions arising during the progress of a trial, in general rest in the discretion of the court with which appellate courts will not interfere, but it is sufficient to say, as to this point, that no exception was taken.

There are two exceptions taken to the admission of evidence which are properly presented for our consideration: The first, in permitting the conductor to state that he honestly believed that the plaintiff had not surrendered a ticket entitling him to be carried to Utica, and the other, in permitting the conductor to state that he believed it to be his duty to put the plaintiff off the cars if he did not pay his fare. This evidence was allowed upon the question of damages only. If it had appeared that the plaintiff's claim was limited to compensatory damages strictly, the evidence would not have been proper or material,

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because if the plaintiff was unlawfully ejected from the cars, the good faith of the conductor would not be a defence, nor impair the right of the plaintiff to actual damages. There is nothing in the case to show that the plaintiff did not intend to claim punitive damages. The complaint claimed \$6,000 damages, and the real injury was not very serious.

The counsel for the plaintiff contends that it was not a case where punitive damages could be legally allowed. The case, as claimed by the plaintiff, was somewhat aggravated. He claimed that he was kicked from the cars when the train was in motion, after he had surrendered a ticket entitling him to ride to Utica. It is not needful to determine the question definitely, but as the case was presented by the plaintiff, it was one where it is evident such a claim might be made, and, if so, the court was justified in admitting evidence relevant and proper upon that phase of the case. It is not disputed but that such evidence is proper upon the question of exemplary damages. (53 N. Y., 25; 35 id., 300; 6 id., 97.) In order to have presented the point of immateriality properly upon the question of compensatory damages, the counsel for the plaintiff, when this evidence was offered, should have disclaimed any claim for any further damages.

Another answer to these exceptions is, that the evidence could not have legally injured the plaintiff. The jury found against any cause of action, and therefore evidence, even though erroneously received upon the question of the amount of damages, could not have produced any injury. The counsel argued that though received upon the question of damages, it influenced the jury upon the merits. We cannot presume this, and there is nothing in the case to show it.

As these are the only errors alleged, the judgment must be affirmed.

All concur; ALLEN, J., taking no part.

Judgment affirmed.

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Statement of case.

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J. FRANK PHILLIPS, Appellant, v. HENRY W. WHEELER et al., Respondents.

A sheriff having several executions in his hands, issued upon judgments rendered in counties outside the judicial district in which he resides, may make a motion in his own county for directions as to the disposition of moneys collected by him, by levy and sale, under the executions.

The provision of the Code (sub. 4, § 401), providing that motions must be made in the district in which the action is triable, or in an adjoining county, etc., refers to motions in an action while it is pending, or such as relate in some way to its pendency or procedure.

Prior to the making of such a motion the sheriff had commenced an action against all the execution creditors, to determine their respective rights; some of the defendants answered, one demurred on the ground that the complaint did not state facts constituting a cause of action; the demurrer was sustained by the General Term. The action was pending at the time of making the motion. *Held*, that this was no bar to the motion; that it was at least a matter of discretion with the court, whether to grant relief on the motion during the pendency of the action.

The property levied upon and sold by the sheriff belonged to a firm composed of defendants. Plaintiff, one of the execution creditors, obtained his judgment by default against defendants jointly, upon claims alleged to be due from their firm. The execution upon this judgment was the first one issued and delivered to the sheriff. Upon motion thereafter made by defendant W., the judgment was opened, and he was allowed to answer; he did so, denying the indebtedness, and upon trial obtained judgment, adjudging that the firm was not indebted to plaintiff. The other two defendants not having joined in the motion the original judgment was left standing as against them. *Held*, that by the change in the original judgment the execution was practically superseded; that if it retained any vitality it was only against the two defendants, for their debt, not the debt of the firm, and hence could take only their interest in the firm after payment of partnership debts; and that a subsequent execution, duly issued, upon a judgment against all the partners upon a firm debt, was entitled to a preference.

(Argued September 26, 1876; decided October 3, 1876.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, affirming an order of Special Term, which directed George Lamoree, late sheriff

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Opinion of the Court, per EARL, J.

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of Dutchess county, to pay over to the owners of a judgment obtained by Charles Cornwall against the defendants herein, the proceeds of certain personal property belonging to their firm which had been levied upon and sold by said sheriff, by virtue of several executions. (Mem. of decision below, 2 Hun, 603.)

The motion was made by said sheriff, in Dutchess county; all of the judgments upon which the executions in the sheriff's hands were issued, including that of plaintiff's, were in actions having their venue in the city and county of New York, except that of said Cornwall, the venue in which was in Greene county.

The facts sufficiently appear in the opinion.

*Amasa J. Parker*, for the appellant. The motion was not made in the proper district. (Code, § 401, sub. 4.) Phillip's execution did not become dormant. (2 J. R., 418; 11 id., 110; 17 id., 274; 5 Hill, 337; 16 Barb., 585; 5 Cow., 390; 12 Wend., 404; *Dunderdale v. Sawvestre*, 13 Abb. Pr., 106.)

*George F. Oomstock* and *H. A. Nelson*, for the respondent. The execution was dormant when the levy was made, and such levy was made only under the warrant of attachment. (*Camp v. Chamberlain*, 5 Den., 198; 3 R. S., 645, § 14; *Godfrey v. Gibbons*, 22 Wend., 569; *Root v. Wagner*, 30 N. Y., 9; *Kellogg v. Griffin*, 17 J. R., 274.) The question of the dormancy of the execution had no bearing on the issue raised by the demurrer of defendant Smith. (*People ex rel. Reilly v. Johnson*, 38 N. Y., 58; *Sheldon v. Edwards*, 35 id., 287-289; *Campbell v. Gonsalus*, 25 id., 617.)

EARL, J. On the 16th day of October, 1867, plaintiff recovered judgment by default against Wheeler, Smith and Phillips, the defendants, upon claims alleged to be due from them jointly as a firm. Upon that judgment execution was issued and delivered to Lamoree, sheriff of Dutchess county, October 30, 1867. On the next day, in an action commenced

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against the same firm to recover a firm debt by Charles Cornwall, an attachment was issued against the property of the firm and delivered to the same sheriff. On the last named day the sheriff seized and attached all the property of the defendant in his county. Subsequently other judgments were recovered against the same defendants and other executions issued thereon to the same sheriff, and judgment was recovered in the Cornwall action for upwards of \$2,500 and execution was also issued thereon. The sheriff sold all the property seized and attached and the net proceeds thereof was \$1,779.44, which he held in his hands at the time he made this motion. This sum Phillips claimed upon the execution issued upon his judgment and the owners of the Cornwall judgment claimed it upon their execution. And this motion was made at a special term of the Supreme Court held in Dutchess county, by the sheriff, notice having been served upon all the owners of the executions in his hands, for an order directing the disposition of the money so in his hands. The court at Special Term ordered it to be paid upon the Cornwall execution and from that order Phillips appealed to the General Term and from affirmance there to this court. The sole question, therefore, for us to determine upon the merits is, whether the money was applicable upon the Phillips execution or upon the Cornwall execution.

Two preliminary objections are taken which do not go to the merits of the case, which must first be noticed. The Phillips judgment was recovered in New York and the Cornwall judgment in Greene county, and it is objected that the motion could not be made in Dutchess county, as that county was not in the judicial district or adjoining the counties in which either of the actions were triable. Subdivision 4 of section 401 of the Code provides, that "motions upon notice must be made within the district in which the action is triable, or in a county adjoining that in which it is triable, except that where the action is triable in the first judicial district the motion must be made therein, and no motion upon notice can be made in the first judicial district in an action

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triable elsewhere." The motions here referred to are motions in the action while it is pending or such as relate in some way to its pendency or procedure. Here the actions were ended and *pro hac vice* the judgments were fully executed. The controversy was over the proceeds in the hands of the sheriff. He desired to know what to do with them, and we think he could apply to the Supreme Court in his own county for directions.

Before this motion was made the sheriff had commenced an action in the Supreme Court, in his name as plaintiff, against all the owners of the various executions as defendants, setting forth all the facts and asking that he might pay over the money under the direction of the court, and that the defendants be required to interplead, and their claims thereto thus settled. Some of the defendants answered. One of them demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The Special Term overruled the demurrer, but upon appeal to the General Term the demurrer was sustained. After that it does not appear that any thing was done in that action, and it was pending at the time this motion was made. It is now claimed that the pendency of that action is an answer to this motion. We are of opinion that it is not. The plaintiff was embarrassed in his maintenance of that action. Some of the defendants answered, and one demurred, and upon the demurrer the General Term had decided that the action could not be maintained. The decision must have been based upon some principal that went to the very foundation of the action. If the relief sought by the sheriff could not be obtained in that action this motion was very properly entertained. If it could have been obtained in that action, then we know of no rule of law that deprives the court of its jurisdiction to grant the relief upon this motion. The pendency of the action is no bar to the motion seeking the same end by a different road. It was at least matter of discretion in the court to grant the relief upon this motion during the pendency of the action.

Upon the merits we think a proper disposition of the case



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was made by the court below. After the execution was issued on the Phillips judgment, upon the motion of Wheeler, one of the defendants therein, an order was made by the Supreme Court opening the judgment and allowing him to answer. He answered denying the indebtedness of the firm to the plaintiff, and the issue thus formed was referred, and the referee found that the firm was not indebted to the plaintiff, and ordered judgment for defendant Wheeler against the plaintiff for his costs, and judgment was so entered. The other two defendants not having moved to vacate the judgment, it was left standing against them, and that was all the judgment the plaintiff then had. He had no judgment against the three or the firm, but only a judgment against the two. There was, therefore, no judgment to uphold the execution which had been issued against the three defendants, and that execution was practically superseded, its foundation having been destroyed by the action of the court upon the judgment. But if the execution had any vitality, it was simply as an execution against the two defendants for their debt, and not the debt of the firm, and hence could take only the interest of the two in the firm property after the payment of the firm debts. It follows, therefore, that the Cornwall execution, which was properly issued upon judgment obtained against all the members of the firm for a firm debt, had the priority, and that a proper disposition was made of the money by the order appealed from.

The order should be affirmed, with costs.

All concur.

Order affirmed.

## Statement of case.

THE PEOPLE ex rel. THE CANAJOHARIE NATIONAL BANK,  
Appellants, v. THE BOARD OF SUPERVISORS OF MONTGOMERY  
COUNTY, Respondent.

The amendment of a statute, by declaring that the same shall read as prescribed by the amendatory act, is not a repeal of the original statute; but from the time of the passage of the amendatory act, the whole force of the enactment, as to subsequent transactions, rests upon it. The former statute is merged in it, has no vitality distinct from it, and can only be referred to as to past transactions. A repeal, therefore, of the amendatory act does not revive the original act, but both fall together. Accordingly, *held*, that the act of 1874 (chap. 180, Laws of 1874), repealing the act of 1873 (chap. 525, Laws of 1873), which amended the act of 1867 (chap. 664, Laws of 1867), enabling the supervisors of Montgomery county to refund illegal taxes, did not restore the act of 1867, but both were abrogated.

Where the legislature makes an appropriation of money, and directs the same to be levied by tax, either general or local, for the satisfaction of a claim, which is not a public charge, or recoverable by action, but is only founded on justice and equity, it vests no absolute right in the claimant; and when no condition is imposed upon him, and nothing is done or required to be done by him as a consideration for the concession, there is nothing which gives the enactment the form or sanction of a contract, and so protected by the Constitution. Until, therefore, the money is raised and actually paid over, the whole subject is within the control of the legislature, and a repeal of the enactment is valid.

As by the statutes so repealed, as above stated, the amount of a claim for a tax illegally assessed and paid, when determined by the board of supervisors, was made a county charge, and said board had no discretion to allow or disallow the same, or in determining whether they would or would not audit or adjust it, the functions of the board, judicial in their character, and so final and conclusive until reversed, were limited to ascertaining the amount. A repeal, therefore, of the act making the claim a county charge did not reverse any judicial determination of the board.

Accordingly, *held*, where, prior to the passage of the repealing act, a claim had been presented to the board of supervisors, and the amount thereof fixed and determined by it, but the same had not been collected and paid, that the action of the board did not add to the force or effect of the statutes, or make them irrepealable; and that, by the repeal, all of the proceedings of the board fell with them.

The cases wherein the actions of boards of supervisors, in the settlement of disputed claims, or in the audit and allowance of county charges,

87	109
114	68
87	109
128	373
87	109
136	356
136	398

## Statement of case.

are regarded as in their nature judicial, are where the whole matter is within their jurisdiction.

*Supervisors v. Briggs* (2 Den., 26), *People v. Supervisors* (26 Barb., 118), *Supervisors v. Birdsall* (4 Wend., 453), *People v. Stocking* (50 Barb., 573), *People v. Stout* (28 Barb., 349) distinguished.

(Argued September 26, 1876; decided October 3, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term denying a motion on the part of relator for a mandamus requiring defendant to levy and collect a tax to pay an alleged claim in his favor.

The relator is a national bank. In November, 1873, it presented to defendant The Board of Supervisors of Montgomery County, under chapter 525, Laws of 1873, a claim for taxes alleged to have been levied and paid by it upon United States bonds and securities which were exempt from taxation. In December, 1873, said board audited relator's claim at \$4,544.19, but did nothing toward levying and collecting the amount by tax, or payment of said sum, after the passage of the act, chapter 180, Laws of 1874, repealing said act of 1873. And in May, 1874, at a meeting of said board, a resolution was adopted reciting the repeal and, thereupon, reconsidering and rescinding the resolution auditing relator's claim. At its annual session, in November, 1874, said board was requested to levy a tax for the amount so awarded to relator, but refused so to do.

*Geo. F. Comstock* for the appellants. Boards of supervisors pass judicially upon claims committed to their decision. (*Brady v. Suprs. of N. Y.*, 2 Sandf., 460, 472; 10 N. Y., 260; *People v. Suprs. of Liv. Co.*, 26 Barb., 118; 12 How., 204; *People v. Stocking*, 50 id., 574; *Suprs. of Chenango v. Birdsall*, 4 Wend., 460; *Suprs. of Onondaga v. Briggs*, 2 Den., 26, 39; 10 Vt., 123; *People v. Suprs. of N. Y.*, 21 How. Pr., 322; *Burch v. Newburry*, 10 N. Y., 392; *Dash v. Van Kleeck*, 7 J. R., 477, 490; *Lawson v. Jeffries*, 47 Miss., 686.) The repeal of a criminal or penal statute ends

## Statement of case.

all prosecutions under it, and will even arrest a judgment in such an action, but this rule does not apply to statutes giving a civil right or remedy. (*Butler v. Palmer*, 1 Hill, 324; *Palmer v. Conley*, 4 Den., 374; 2 N. Y., 182; *Pruyn v. Tyler*, 18 How. Pr., 331; 1 Metc., 174; 1 Black, 358; *People v. Suprs., etc.*, 4 Barb., 64; Sedg. on Const. Law, 108, and note; Smith on Const. Law, 880-882; 6 How., 284.) The vital and only necessary part of the statute was that which directed the board to hear and determine the claim for illegal taxes and to refund the same. (1 N. Y., 30; 1 Kent's Com. [5th ed.], 464; 17 N. Y., 449; *People ex rel. Sherman v. Suprs.*, 30 How. Pr., 173; *Willis v. Havemeyer*, 5 Duer, 447; 15 N. Y., 595; 49 id., 332.)

*Nathaniel C. Moak* for the respondents. The legislature had power, in 1874, to repeal the act of 1874 as amended. (Cooley's Const. Lim. [2d ed.], 125, 126; Const. U. S., art. 1, § 10, sub. 1; *Satterlee v. Matthewson*, 2 Pet., 413; *Watson v. Mercer*, 8 id., 88, 110; *Charles River Bridge v. Warren Bridge*, 11 id., 539; *Bennet v. Boggs Baldwin*, 60 N. Y., 74, 75; *Baltimore, etc., v. Nesbit*, 10 How. [U. S.], 395; *Carpenter v. Commonwealth*, 17 id., 456; *Rutger, etc., v. County, etc.*, 24 id., 300; *Garrison v. City of N. Y.*, 21 Wal., 196, 203; *In re Mayor, etc.*, 49 N. Y., 150; *Barlow v. Gregory*, 31 Conn., 261; *In re v. Hulbert*, 17 Ill., 579; *Todd v. Crumb*, 5 McL., 172; *Larabee v. Baldwin*, 35 Cal., 156; *Daly v. Harwell*, 33 Ga., 46; *People v. Roper*, 35 N. Y., 629, 637, 638; *Scova v. Trus*, 53 N. H., 532; *Van Allen v. Assrs.*, 3 Wal., 573; *Bank v. Magee*, 43 N. Y., 184; *Swift v. City of Poughkeepsie*, 37 id., 511; *Bank v. Elmira*, 53 id., 49; *Dewey v. Suprs., etc.*, 4 T. & C., 606; *Newman v. Suprs., etc.*, 45 N. Y., 676; *Nickodemus v. Saginaw*, 25 Mich., 456; *Beers v. State*, 20 How. [U. S.], 527; *Stocking v. Hunt*, 3 Den., 274; *Watson v. N. Y. C. R. R. Co.*, 47 N. Y., 157; *Curry v. Landers*, 35 Ala. [N. S.], 280; *Conkey v. Hart*, 14 N. Y., 22, 28-31; *City of Augusta v. North*, 57 Me., 392; *Clarke v. McCreary*, 20 Miss., 353; *Morris v. People*,

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Opinion of the Court, per ALLEN, J.

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the legislature, as expressed in those acts to the supervisors of Montgomery county, to hear and determine any claims for assessments illegally or erroneously made upon United States bonds or other securities exempt from taxation, and to refund to the proper persons the amount collected or paid upon such assessments. The amounts so paid are made a county charge by the statutes quoted. The acts were imperative upon the board of supervisors, and that body had no discretion to allow or disallow the same when the amount illegally paid was ascertained. Neither had the supervisors any discretion in determining whether they would or would not audit and adjust them. (*People v. Suprs. of Otsego Co.*, 51 N. Y., 401.) The acts of the supervisors which can in any aspect be regarded as judicial, and therefore final and conclusive until reversed, had respect solely to the amounts at which claims under the acts should be audited and allowed. Had they been left to determine, also, whether these claims were or were not county charges, their decision of that question might have been claimed to be judicial and in the nature of a judgment, but the functions of the supervisors, judicial in their character, being limited to ascertaining and determining the amount or amounts which, when ascertained and determined, the legislature had directed to be raised by tax and paid as other county charges are provided for and paid, a repeal of the acts making the claims a county charge, does not reverse any judgment or judicial determination of the board of supervisors in respect to any matter referred to them. The cases in which it has been held that the action of boards of supervisors in the settlement of disputed claims, or the audit and allowance of county charges have been regarded as in their nature judicial, have been those where the whole matter was within their jurisdiction. (*Supervisors of Onondaga v. Briggs*, 2 Denio, 26; *People v. Supervisors of Livingston County*, 26 Barb., 118; *Supervisors of Chenango v. Birdsall*, 4 Wend., 453; *People v. Stocking*, 50 Barb., 573; *People v. Stout*, 23 id., 349.)

The claim of the relator was made a county charge, not by the adjudication and allowance of the board of supervisors,

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but by the legislature in the exercise of the taxing power, in respect to which it is sovereign. The legislature may determine what sums shall be raised by taxation, and for what purposes, and it may make appropriations of money, and cause the same to be levied by tax, either general or local, for the satisfaction of a claim which is not recoverable by action, or a public charge in virtue of any previous or existing laws, and which is only founded in equity and justice, or which the legislature regards as equitable and just. (*Town of Guilford v. Supervisors of Chenango*, 3 Kern., 143; *Brewster v. City of Syracuse*, 19 N. Y., 116.) The action of the legislature in the exercise of the power of taxation is not the subject of judicial review, and, in the present instance, was not the subject of review, or submitted to the action or discretion of the board of supervisors. (*People v. Mayor of Brooklyn*, 4 Comst., 419.) The action of the legislature was but a concession to the supposed equities of the claimants, but vested no absolute rights in them, and did not impair or curtail either the general powers of the legislature over taxation or its power in respect to the particular tax. The legislature could not and did not assume to surrender any power in respect to taxation or over the class of claims mentioned in the statutes, so far as they were the proper subjects of legislative action. No conditions were imposed upon the relator or the other claimants under the acts, and nothing was done or required to be done as a remuneration for the concession. There was nothing in the legislation, or any thing done or to be done under it, which would give it the form or sanction of a contract so as to bring it within the protection of the Constitution, prohibiting the passage of laws impairing the obligations of contracts. The relator had, and in the nature of things could have, no vested right in the perpetuity or continuance of the law. Until the money was raised and actually paid over, the whole subject was within the power of the legislature; and a repeal of the act, operating merely as a revocation of a gratuitous concession, was valid as within the legitimate powers of the legislature, having plenary juris-

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diction and power over the whole subject. (*Rector, etc., of Christ Church v. Philadelphia*, 24 How. [U. S.], 300; *People v. Commissioners of Taxes of N. Y.*, 47 N. Y., 501.) As the legislature might have refrained from enacting the laws, and the relator and the other claimants would not have been thereby deprived of any legal rights, so a repeal of the laws, voluntarily and gratuitously passed, worked no legal injury to them. The action of the supervisors in obeying the mandate of the legislature and ascertaining the amounts that had been paid for taxes upon securities exempt from taxation, could not add to the force and effect of the law or make it irrevocable. If the legislature had power over it the day before the supervisors acted, they had the same power the day after and until the last moment before the payment of the money to the claimants. All that was done by the supervisors under the act, was to give effect to the spontaneous grant or concession of the legislature, and, upon the repeal of the law, the acts done necessarily fell with it, or were without legal efficacy or significance from that time. Had the legislature delegated to the board of supervisors the power to determine whether these claims should be paid as county charges, a repeal of the act, even after action of the board of supervisors, would have terminated all proceedings under it. In that case, the declaration that the claims should be paid as county charges would have been legislative in its character, while the determination of the amounts would have been judicial. The relator's right to any remedy exists solely by virtue of the statute and not upon any contract authorized by the statute, and therefore he has no vested right with which the legislature could not interfere.

The only question, then, is whether the act chapter 180, of the Laws of 1874, repealed the act of 1867 as well as that of 1873 (*supra*), and thus recalled the concession and revoked the mandate to the board of supervisors and took from that body all power in the premises. If by the repeal of the act of 1873 the law of 1867 was restored, then the mandate remained, and the relator was entitled to a *mandamus*, as was held in *People v. Supervisors of Otsego County (supra)*. The result in such

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case would only be to modify the law in apportioning the tax, and the form of the taxation, and impose the whole amount upon the county at large, instead of apportioning it among the towns upon some equitable basis. This was clearly within the province of the legislature, and if such is the effect of the legislation, the mandatory part of the law in all that is substantial to the rights of the relator, and the remedy under the law remains. By the law of 1873 that of 1867 was not repealed; but from the time the former was passed, it became the law as to all proceedings thereafter, while all that had been done before that time was supported by the first act, and must be judged by it. (*Ely v. Holton*, 15 N. Y., 595; *Moore v. Mausert*, 49 id., 332).

At the time of the passage of the repealing act of 1874, by which the act of 1873 was in terms and by reference to its title and the date of its passage repealed, the act of 1873 was the only law in force. The earlier statute had been merged by being incorporated and united with new provisions in the amendatory act substituted for it. The general rule is, that if a statute that repeals another is itself afterwards repealed, the first statute is thereby revived, without any formal words for that purpose. (1 Black's Com., 90; *Wheeler v. Roberts*, 7 Cow., 536.) This rule is especially applicable to the case of a statute repealed in express terms, and in such a case, the reason of the rule is obvious. By a repeal of the repealing act a change of purpose and of policy in the legislature is clearly indicated, and effect is given to the intent of the legislature thus manifested by holding that the original statute is revived. It was held by the Supreme Court of Wisconsin in *Goodno v. Oshkosh* (31 Wis., 127), that the repeal of a statute amending a former statute by making the same to read as recited at length in the later act, did not work a revival of the first act; but the decision proceeded upon the effect of a statute in that State, the same as the English statute, twelfth and thirteenth Victoria (chap. 21, § 5), enacting that no act or part of an act repealed by a subsequent act of the legislature shall be revived by the repeal of such repealing act, unless



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express words be added reviving such repealed act. With us the amendment of a statute or part of a statute, by making the same read as prescribed by the amendatory statute, thus incorporating all that is deemed desirable to retain of the old law in the new, is not regarded as a repeal of the parts thus transferred, but from the time of the passage of the new statute, the whole force of the enactment rests upon the later statute. Although the former act remains upon the statute book and is not repealed, either expressly or by implication, it is no longer the law of the land in respect to new cases that may arise. In the case before us, the substance and body of the act of 1867 was incorporated in and made a part of the act of 1873; the latter statute was but a modification of the details for giving effect to the intention of the legislature to reimburse those who had been illegally assessed and compelled to pay taxes upon securities exempt from taxation. The passage of that act indicated no change of purpose in the legislature, or any different intent than such as was indicated by the former statute. The object and purpose of both were the same, to make certain individual claims county charges, and provide for their payment. The details of both statutes, and all the matters in respect to which the act of 1873 differed from that of 1867, were incidental to the main purpose. During the existence of the law of 1873, no part of the law of 1867 was in force, or could be referred to for any purpose, except to sustain past transactions under it. Both statutes were special and local, and for a private purpose, did not affect the general administration of State or county affairs, and both could be blotted out without interfering with the governmental machinery. A repeal of the later and more perfect statute, which was the only law in existence making the claims a county charge and providing for their payment, was indicative of an intention to revoke the concession that had been made, rather than of an intention to restore the first and more imperfect act. The change of purpose indicated by the repealing statute was radical, going to the subject-matter of the legislation, and was not

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limited to the more specific details and modal parts of the act of 1873. The legislature may have supposed, although erroneously, that the act of 1867 was *functus officio*, not having been acted upon by the board of supervisors at its then next meeting. If so, this was a reason why that act should not be mentioned in the repealing statute. This, however, is but a slight circumstance. The broader ground upon which to rest a decision is the fact that the statute which the legislature did in terms repeal was the only law in force at that time under which the relator and others similarly situated had any right to relief or any remedy for the taxes wrongfully imposed, and that the former act upon that subject was by incorporation merged in it and had no vitality distinct from it. So long as statutes must have effect according to the intent of the legislature as manifested by the language employed, and in the light of the circumstances under which the acts are passed, there could hardly be, without express words, a stronger manifestation of an intent to abrogate all legislation giving those who had paid taxes upon government securities a claim upon the county for the amounts paid, than by a law in terms repealing the only statute in force which embodied the only other statute that had been passed upon the subject. In *Warren v. Windle* (3 East, 205), it is intimated that where a statute professes to repeal absolutely a prior law and substitutes other statutes upon the subject which are limited to continue only till a certain time, the prior law does not revive after the repealed statute is spent, unless the intent of the legislature to that effect be expressed. The reverse of this was held in *Collins v. Smith* (6 Whart., 294), and the case of *Warren v. Windle*, criticized by Ch. J. Gibson. But the revival in the Pennsylvania case of the first statute was held to arise, not from an implication of intention but from a removal of the pressure which kept the original statute down. In this case, the statute of 1867 was annulled, for all practical purposes, by its merger in the statute of 1873; and when the latter act was repealed, it as effectually annihilated the act of 1867 as if the same had been expressly

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mentioned in the repealing act. This is a necessary implication from the repeal. By the repeal, therefore, the relator has lost all right to any remedy under either statute.

The order must be affirmed.

All concur, except RAPALLO, J., not voting.

Order affirmed.

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IN THE MATTER OF WILLIAM BEGGS an Applicant for admission to the Bar.

Under the provisions of the act of 1871 (chap. 486, Laws of 1871) in relation to the qualifications of persons applying to be admitted to practice as attorneys, etc., it is for the General Term to satisfy itself of and to approve the applicant "for his good character and learning." The exercise of this discretionary power by the General Term cannot, ordinarily, be reviewed or interfered with by this court.

*It seems* that if the General Term should deny, in a particular case, that it had the legal power to admit, though satisfied that the applicant was possessed of the requisite qualifications, this court might review the order so far as to discover whether the power existed; so, also, if a clear case of abuse of discretion appeared this court might correct.

*In re The Graduates, etc.* (11 Abb. Pr., 301), distinguished.

An appeal from an order refusing to approve of the good character of an applicant, and denying his admission on that ground, cannot be sustained where the case furnished does not present all the facts before the General Term and upon which it acted.

(Submitted September 26, 1876; decided October 3, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department denying appellant's motion to set aside the report on character of a committee appointed to examine appellant on application for admission to practice as attorney and counselor and to admit said appellant.

The facts sufficiently appear in the opinion.

*William Beggs*, appellant, in person.

FOLGER, J. The statute (chap. 486, Laws of 1871) makes it the duty of the judges of this court, or a majority of them, to establish rules and regulations in relation to the admission

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of persons applying to be admitted as attorneys, etc. This is all the original power which that law confers upon this court, or the members of it.

It further provides that every male citizen aged twenty-one years, applying to be admitted, shall be examined by the justices of the Supreme Court, or a committee appointed by it, at a General Term; and if he shall be found to have complied with the rules and regulations prescribed by the judges of the Court of Appeals, and shall be approved by the justices of the Supreme Court for his good character and learning, it shall direct an order to be entered stating the same, and thereupon such person shall be entitled to practice as an attorney, etc. The approval is with the General Term of the Supreme Court alone. It must be satisfied of the good character of the applicant. It may inform itself on this head through the inquiries of a committee of counselors of its bar, and on the report of that committee it has the power of admitting or rejecting. Such is the way in which it acted in this case. It is a discretionary power, to be exercised upon a consideration of all the facts before it. This court cannot interfere with the exercise of that discretion, in ordinary cases. If the General Term should deny, in a particular case, that it had the legal power to admit, though satisfied that the applicant was possessed of sufficient legal acquirements, and had a good character, and was a male citizen of the age of twenty-one years (Laws of 1871, chap. 486, § 3), this court would review its order so far as to discover whether it had the power of admission in that case. In the case *In re The Graduates, etc.* (11 Abb. Pr., 301), the General Term had denied the admission on the ground of the unconstitutionality of the law. Or, if a clear case of abuse of discretion appeared, this court might correct. This is the appellate power which it has. Where the power of the General Term has been used, and it has, in the exercise of a temperate discretion, passed upon the reports of the committee presented to it, and weighed all the facts, this court is powerless to interfere, either to approve or disapprove. It is for the General Term to determine whether the

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applicant has or has not the qualifications of age, citizenship, acquirements and good character.

Such is this case. The committee upon the character of the applicant for admission declined to report favorably upon it, and based their declination upon matter appearing in certain papers issuing from him. The General Term, informed by this report, and on reading the testimony presented, not capriciously or willfully, but on judicial consideration thereof, decided that it could not grant the petition of the applicant. This court may not review that decision.

The appellant considers the case above cited (11 Abb., *supra*) as establishing his right to appeal. That case arose under the Constitution of 1846, by which any male citizen of the age of twenty-one years, of good moral character, and who possessed the requisite qualifications of learning and ability, should be entitled to admission to practice in all the courts of the State. (Const. 1846 [1 Edm. Stat., p. 52], art. 6, § 8.) "The Constitution conferred the absolute right of admission upon every one possessing the requisite qualifications. \* \* \* It being ascertained that the applicant possessed the requisite qualifications his admission followed as a legal necessity. \* \* \* The proceedings upon such an application are to be regarded as of a judicial nature." (11 Abb., *supra*, p. 328.) It was held that the right was a substantial one; that the order of the General Term affected it; that it was made in a special proceeding (Code, § 11, sub. 3); that it was an actual determination of the court; was a final order (*id.*), and that it was appealable to this court. Three judges dissented; on what ground does not appear. The judiciary article of the Constitution, as it was amended in 1867, does not contain the provision for the admission of attorneys, above cited from the Constitution of 1846, nor any other. Instead of that there is the statute of 1871, above cited. By that every male citizen of the age of twenty-one years, thereafter applying to be admitted to practice as attorney, shall be examined by the justices of the Supreme Court, or a committee appointed by the court, at a General Term thereof, and if he shall be

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approved by the said justices for his good character and learning, he may be admitted. Clearly, it is for the justices to approve, and it is a matter in their discretion to approve or not, and their decision is final and non-appealable, save in the exceptional cases above noted. The right to admission does not depend alone upon the possession of the qualifications, but upon the approval of the justices. The legislature has wisely seen fit to confer upon them that discretion. They are supreme and irreversible in the exercise of it, unless that exercise has been clearly capricious or willful, when it may be reversed.

Clearly, in a case where the proofs as to good character are balanced *pro* and *con*, or where there is proper proof upon both sides, and the General Term has considered them, this court may not entertain an appeal. Besides the foregoing reasons for a dismissal of the appeal, there is another. The papers do not furnish this court with all the facts which were before the General Term and its committee. The complaint in the action brought by Beggs is not in the papers, yet the allegations in that, not withdrawn, but attempted to be justified, influenced the committee and the General Term. This court could not determine that the General Term were in error in their estimation of the facts, when the facts are not found in the appeal papers.

We do not express any opinion upon the merits. The papers before us show that the applicant is not lacking in mental ability, and the report of one of the committees shows him possessed of qualification in knowledge of the law. It is to be hoped that explanations may be forthcoming, that misunderstandings may be discovered and removed, so as to modify the unfavorable conclusions reached by the committee on character, and a change of the judgment of the General Term be warranted.

The appeal should be dismissed.

All concur.

Appeal dismissed.

## Statement of case.

## GUSTAVUS ISAACS, Appellant, v. THE NEW YORK PLASTER WORKS, Respondent.

plaintiff

In an action to recover damages for an alleged breach by defendant of a contract to deliver plaster stone, plaintiff's evidence tended to show that defendant contracted to ship from N. S. and to deliver to plaintiff, at N. Y. or W., 8,000 tons of said stone during the season, the same to be delivered as fast as vessels could be obtained in N. S. to carry them, to be paid for on delivery. Defendant, during the season, shipped two cargoes of the stone to N. Y., delivery of which ~~defendant~~, upon arrival, demanded and was ready to receive and pay for, but defendant refused to deliver. The court nonsuited plaintiff. *Held*, error; that the right to take the whole season for delivery was limited by the provision to ship as fast as vessels could be obtained; that the proof that defendant had shipped cargoes which arrived, was evidence that it could have obtained vessels before the close of the season; also, that as plaintiff was ready to receive and pay for the cargoes which did arrive, it was no defence to the action that he was not ready to receive and pay for the balance at the end of the season.

(Submitted September 22, 1876; decided October 6, 1876.)

. APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant entered upon an order dismissing plaintiff's complaint on trial.

The action was brought to recover damages for an alleged breach of a contract to deliver a quantity of plaster stone.

The complaint alleged, and defendant's evidence tended to show, that on or about July 1, 1872, defendant contracted by parol to ship from Nova Scotia and to deliver to plaintiff at a dock in New York, or Williamsburgh, as plaintiff might designate on arrival, 3,000 tons of plaster stone at four dollars and fifty cents per ton, to be paid for on delivery; defendant to ship and deliver as fast as vessels could be obtained at Nova Scotia, to carry the stone. The season ran to January, 1873. Two cargoes were shipped in September and October, which, on arrival, were delivered to, received by and paid for under the contract. Two cargoes were thereafter shipped by the vessels "Kedron" and "Simpson." Upon their arrival plaintiff demanded delivery, designating a wharf, and offered to pay

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the contract-price. Defendant refused to deliver. Plaintiff did not prove a demand or offer to pay for the balance of the 3,000 tons, or that he was at the end of the season ready and willing to pay therefor.

*G. A. Seixas* for the appellant.

*F. E. Dana* for the respondent. Plaintiff was bound to show a sufficient demand and tender of performance. (*Dunham v. Mann*, 8 N. Y., 508; *Nelson v. Plimpton F. E. Co.*, 55 id., 480; *Tipton v. Feitner*, 20 id., 425; *Lester v. Jewett*, 11 id., 453; *Medbury v. Furnival*, 56 id., 638; *Cunningham v. Jones*, 20 N. Y., 487; *Wheeler v. Garcia*, 40 id., 584; *Newton v. Wales*, 3 Robt., 453; *Akin v. Davis*, 43 Barb., 44; *Christ v. Armour*, 34 id., 378; *Hawkins v. Brown*, 30 id., 206; *Cook v. Petral*, 13 Wend., 285; *Porter v. Rose*, 12 J. R., 209; *Topping v. Root*, 5 Cow., 404; *McDonald v. Williams*, 1 Hilt., 584.) Plaintiff was bound to allege and prove that he was ready to pay on delivery. (*Mount v. Lyon*, 49 N. Y., 552; *Coonley v. Anderson*, 1 Hill, 519; *Vail v. Adams*, 1 Seld., 155; *Bronson v. Winans*, 4 id., 182; *Hil on Sales*, 507; *Russell v. Nicoll*, 3 Wend., 112; *Kein v. Tupper*, 52 N. Y., 550.)

ANDREWS, J. If, by the contract, the defendant had the whole season in which to deliver the plaster, and was not, under any circumstances, bound to deliver any part of it until the very close, the complaint was properly dismissed for two reasons; first, the refusal to deliver the cargoes of the "Kedron" and "Simpson," which arrived in December, before the close of the season, was not a breach of the defendant's contract, and, second, the failure of the defendant to deliver the plaster at the close of the season, gave no right of action to the plaintiff, unless he was then ready to receive and pay for it. This he was bound to aver and prove, and no proof was given upon the subject. (*Porter v. Rose*, 12 J. R., 209; *Coonley v. Anderson*, 1 Hill, 519.) But the jury would have been authorized to find from the evidence that it was a part of the



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contract that the defendant was to deliver the plaster in New York as fast as vessels could be obtained in Nova Scotia to carry it, and that the right to take the whole season for the delivery was not absolute, but was subject to the limitation mentioned. The proof that the defendant had shipped by the "Kedron" and "Simpson" in December, cargoes of plaster consigned to the defendant in New York, which arrived, was evidence that the defendant could have obtained vessels before the close of the season, and could have delivered on their contract with the plaintiff before that time, an amount of plaster equal to the cargoes of these vessels. The plaintiff on the arrival of the "Kedron," demanded the delivery of the cargo, and was ready to receive and pay for it, but the defendant refused to deliver it, giving no reason for the refusal, and the reason can only be inferred from the fact that plaster had then greatly advanced in price. The like demand was made on the arrival of the "Simpson," and delivery was also refused. It is evident that the parties did not contemplate a delivery of the whole 3,000 tons at one time. The plaintiff was to receive it as vessels arrived, from time to time, and payment was to be made as each cargo was delivered. This is the plain inference from the contract, and is the practical construction put upon it by the parties. We are of opinion that the case should have been submitted to the jury upon the question whether there was a breach of the defendant's contract to deliver the plaster as fast as vessels could be procured to carry it.

If the plaintiff was ready to receive and pay for the cargoes of the "Kedron" and "Simpson," it is no answer to the action that he was not ready to receive and pay for the balance of the plaster remaining undelivered at the end of the season, and if the defendant is entitled to damages for any subsequent breach of the contract by the plaintiff, they may be recovered in an independent action, or they might have been made the subject of a counter-claim. (*Tipton v. Feitner*, 20 N. Y., 425.)

The judgment should be reversed and a new trial granted.  
All concur.

Judgment reversed.

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Statement of case.

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THEODORE M. DAVIS, as Receiver, etc., Respondent, v. CHARLES W. COPELAND, Appellant.

Defendant executed a bond, "to be binding for one year only from date," conditioned that G. would pay within five days after maturity any paper discounted by plaintiff for him. In an action upon the bond, *held* (CHURCH, Ch. J., dissenting), that the limitation as to time related to the time when paper was discounted, not when it matured; and that under it defendant was liable for paper discounted within the year, but not maturing until after its expiration.

(Argued September 27, 1876; decided October 6, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This was an action by plaintiff, as receiver of the Ocean National Bank, upon a bond executed by defendant, of which the following is a copy :

"Whereas, W. F. Gleason has opened an account in the Ocean National Bank, and will offer notes and acceptances there for discount ;

"Now, then, I, the undersigned, Charles W. Copeland, am held and firmly bound unto said Ocean National Bank in the sum of \$2,000, in money of the United States, to be to them, their successors and assigns, well and truly paid, for which payment well and truly to be made, I do bind myself, my heirs, executors, administrators and assigns, firmly by these presents, sealed with my seal, and dated the 15th day of December, 1870.

"The condition of the above obligation is such, that if the said W. F. Gleason shall well and truly take up and pay within five days after maturity thereof any paper discounted for his account in said bank, together with interest and costs of protest and expenses thereon, and shall within the same time make good any and all checks certified for or paid by said

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Opinion of the Court, per MILLER, J.

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bank for him, and shall save said bank harmless from all damage by reason of his having an account therein, this bond shall be void, otherwise in full force and virtue. This bond to be binding for one year only from date.

[L. s.]

“CHARLES W. COPELAND.”

Sometime prior to the expiration of the year said bank discounted for Gleason a bill of exchange for \$2,000 and a promissory note for \$1,500, both of which were payable after the expiration of the year, and were not paid at or within five days after maturity. The referee directed judgment for the penalty of the bond.

*Joseph J. Marrin* for the appellant.

*George E. Sibley* for the respondent. The bond applied to paper discounted within the year. (*Hamilton v. Van Rensselaer*, 43 N. Y., 244; *Schultz v. Crane*, 6 Hun, 236; *Clark v. Burdett*, 2 Hall, 197; *L. Mfg. Co. v. Welch*, 10 How. [U. S.], 461; *Bell v. Bruen*, 1 id., 169.) The words of the bond are to be taken as strongly against the guarantor as the sense will admit. (*Mason v. Pritchard*, 12 East, 227; *Drummond v. Prestman*, 12 Wheat., 515; *Douglas v. Reynolds*, 7 Pet., 113; *Lawrence v. McCalmont*, 2 How. [U. S.], 426; *Mayor v. Isaacs*, 6 M. & W., 605; *Lee v. Dick*, 10 Pet., 482; *Marran v. Ballus*, 16 Pet., 528; *Melville v. Hayden*, 3 B. & Ald., 593.

MILLER, J. The object of the bond in suit evidently was to provide for Gleason a credit at the bank on account of paper discounted for his benefit and checks certified for or paid by the bank for him, and it should be construed having in view the purpose which it was designed to promote. A strict interpretation would limit the liability of the defendant to a single year, while as a specialty it was obligatory for twenty years. This is not claimed, however, and the limitation that it was to be binding one year only from date, evi-

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Opinion of the Court, per MILLER, J.

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dently did not relate to the time when the paper discounted might mature, but to the time when it was discounted and to the certification and payment of checks within the period named. It is apparent that to this extent the indemnity was intended to be given and was so understood by Gleason, the bank and the defendant. Gleason desired accommodation at the bank during the year, and the bank was willing to extend it to him for that period upon the strength of the guaranty contained in the bond executed by the defendant. If the accommodation was limited to such paper only as became due during the year, the benefits to be derived from the same would be restricted to a very narrow compass and would confer comparatively but little advantage. All paper becoming due after the expiration of the year would be excluded as beyond the terms of the guaranty, and it is unreasonable to suppose that it was the intention of the parties thus to circumscribe and limit the effect of the bond. In fact, it would be contrary to the ordinary course of business, in dealings of this character, to assume that any thing else was intended than to fix a period within which the transactions of the parties were to take place without regard to any other matter, and no other construction is to be implied unless the language employed is such as to be susceptible of no other interpretation. It should, therefore, in contemplation of the facts, be construed as if the bond contained the words "paper discounted and checks certified or paid" after the word "for," and thus referred expressly to the paper which the bond was intended to secure and the dealings which Gleason was to have with the bank, or any transactions of this character. Regarded in this light the defendant was liable and the recovery can be upheld.

No other question arises which demands comment, and the judgment should be affirmed, with costs.

All concur, except CHURCH, Ch. J., dissenting.

Judgment affirmed.

## Statement of case.

SARAH BRIDGES, Appellant, v. HENRY L. WYCKOFF et al.,  
Respondents.

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The owner of certain lands caused the same to be laid out into lots and streets, and a map thereof to be made and filed. In 1836 some of the lots were conveyed to B., the deed describing them as bounded on the sides of the streets adjoining; the deed conveyed also the grantee's interest in one-half of the streets lying immediately in front of the lots, "the same to be used, however, as public streets or roads forever." B. built a fence in front of some of the lots, inclosing eighteen feet in width of the adjoining street. By several mesne conveyances the lots in 1862 came to the plaintiff; all of the deeds contained the same provision as to the streets; the portion thereof not so inclosed was open for travel, although not formally opened or worked as a street. In 1871 the commissioners of highways of the town, by order, declared the street to be a public highway, and thereafter defendants, as commissioners, removed the fence. In an action of trespass, *held*, that the act of the original owner was a dedication of the land contained in the street as a highway; that there was no revocation of the dedication up to the time of its acceptance by the commissioners; that the erection and maintenance of the fence was not, to the extent of the land included therein, a revocation, as in the deeds the dedication was expressly recognized; and that by the acceptance the dedication became complete, the street a public highway, and defendants were justified in removing the fence.

Also, *held*, that the provision of the statute (1 R. S., 520, § 99, amended by chap. 811, Laws of 1861) declaring that a highway shall cease to be such which is not opened and worked within six years did not apply, as the land did not become a highway until accepted as such in 1871.

Also, *held*, that plaintiff could not claim the land by adverse possession, as he took under a conveyance recognizing the public right, and so it was not held adversely.

(Argued September 27, 1876; decided October 6, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department reversing a judgment for the plaintiff, entered upon a decision of the court on trial without a jury, and granting a new trial.

This was an action of trespass.

The facts sufficiently appear in the opinion.

Wm. W. Goodrich for the appellant. The land in question never was a highway. (*Powers v. Suff. Mfg. Co.*, 4 Cush.,

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Opinion of the Court, per EARL, J.

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332; *Hobbs v. Lowell*, 19 Pick., 405; *City of Oswego v. Oswego Canal Co.*, 6 N. Y., 267; *Childs v. Chappel*, 9 id., 258; *Holdane v. Trustees, etc.*, 21 id., 478; *Clements v. Vil. of West Troy*, 16 Barb., 251; *Trustees, etc., v. Otis*, 37 id., 50.) If the land was a highway in 1836, and not having been worked for six years, it *ipso facto* ceased to be such any longer. (*Lyon v. Munson*, 2 Cow., 426.) Plaintiff acquired title by adverse possession. (*Baldwin v. City of Buffalo*, 29 Barb., 396; *Comrs. v. Taylor*, 2 Bay., 292; *Wash. on Ease. and Serv.*, 218, 219; *Peckham v. Henderson*, 27 Barb., 207.)

*John H. Bergen* for the respondents. Plaintiff having conveyed lots, by deeds referring to the streets, is thereby estopped from denying their existence. (*Rodermund v. Clark*, 46 N. Y., 357; *Bigelow on Estoppel*, 578; *Hyde v. Baldwin*, 17 Pick., 303; *Brown v. Ricketts*, 3 J. Ch., 553; *Thebusson v. Woodford*, 13 Ves., 209; *Churchman v. Ireland*, 1 R. & M., 250; *Tibbitts v. Tibbitts*, 19 Ves., 655; *Smith v. Smith*, 14 Gray, 532; *Wood v. City of Wmsburgh*, 46 Barb., 601; *Hathaway v. Payne*, 34 N. Y., 108, 109, 116.)

EARL, J. It appears that prior to 1836 the owner of land which included the premises in question, laid his land out into lots with streets, one of which is called Locust street. These lots and the streets were designated on a map filed in the county clerk's office. Subsequently lots were sold bounding them upon this street to various persons. Several of the lots were conveyed to Joseph F. Bridges in 1836, some of them lying on Locust street. The deed to him, after describing the lots and bounding then upon the side of the street, contained the following clause: "together with all the right, title and interest of the parties of the first part in and to the one-half of such streets as lie immediately in front of all the lots hereby conveyed, the same to be used, however, as public streets or roads forever." By several mesue conveyances, the last of which was in 1862, several of these lots on Locust street came to the plaintiff. All the deeds contained the clause

above set out. In 1836, after the deed to him, Joseph F. Bridges built a fence in front of the lots in question, and inclosed with his lots eighteen feet in width of the street, and the fence as thus erected was maintained until it was removed in 1873 by the defendants, by the acts complained of in this action. Prior to 1871 this street was never formally opened or worked as a street, but the land was open, except the eighteen feet inclosed with plaintiff's lots, and people crossed and traveled upon it as they chose. In 1871 the commissioners of highways of the town, upon petition of freeholders, made an order declaring Locust street to be a public highway, and directing it to be opened and worked, and in 1873, by direction of defendants, then commissioners of highways, the fence was removed, plaintiffs having first been notified to remove it, which was the trespass complained of.

These facts are not disputed, and it is not disputed that they showed a sufficient dedication of the land contained in Locust street to the public for a street.

All that was needed, therefore, to make the land dedicated a public street was the acceptance of the land dedicated by the proper public authorities as a street, and it is undisputed that there was such acceptance by the highway commissioners of the town in 1871.

There had been no revocation of the dedication at any time. The original proprietors and all the other parties interested might have united and revoked the dedication before acceptance by the public authorities, but this they did not do. It is claimed, however, that the erection and maintenance of the fence inclosing part of the street was to that extent a revocation. The answer to that claim is that it was manifestly not so intended, because in all the deeds coming down as late as 1862, the dedication and the street are expressly recognized. Hence the dedication became complete in 1871. (*The City of Oswego v. Oswego Canal Co.*, 6 N. Y., 257; *Child v. Chappell*, 9 id., 246; *Holdane v. Trustees, etc.*, 21 id., 478; *Baker v. St. Paul*, 8 Minn., 494; Washburne on Eas. [2d ed.], 195; *Requa v. The City of Rochester*, 45 N. Y., 129.)

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Statement of case.

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It is claimed that this street ceased to be a highway because it was not opened or worked in six years. The provision of the statute here alluded to does not apply to this case, as the land dedicated for the street did not become a highway until it was accepted as such in 1871.

It is further claimed that the plaintiff can hold the land fenced in with her lots by adverse possession. The difficulty with this claim is that the land was not adversely claimed or possessed. She took her deed in 1862, and in that the street and the right of the public to use it as such was expressly recognized. The deed showed that at that time there was no claim of right as against the dedication or the right of the public to take and use the land as a street.

It appears to us, therefore, that the defendants as commissioners of highways were completely justified in the removal of the fence.

The order must be affirmed and judgment absolute ordered against the plaintiff, with costs.

All concur.

Order affirmed and judgment accordingly.

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DAVID CHRISTIE, Appellant, v. MARY HAWLEY, Respondent.

The will of C., after various specific devises in fee of portions of a farm conveyed to him by G., contained a devise of 100 acres of land to his grandson, A., and "the remainder of land" belonging to him, of the farm conveyed by G., he devised to the plaintiff. There remained of said farm, over and above the specific devises, about sixteen acres. By a codicil made a few days subsequent to the will, a life estate in said 100 acres was devised to the testator's wife. After the death of A. and the testator's widow, plaintiff brought ejectment for the 100 acres. *Held*, that, assuming the devise to A. was only of a life estate, the clause devising the "remainder of land" referred only to the residue of the farm not before devised or specified, and did not convey the remainder of estate in said 100 acres after the two successive life estates; and that, therefore, plaintiff had no title to the land in question.

(Argued September 27, 1876; decided October 6, 1876.)



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Statement of case

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of defendant, entered upon an order denying a motion for a new trial, and directing judgment upon an order nonsuiting plaintiff on trial.

This was an action of ejectment. Both parties claimed under the will of Andrew Christie, executed February 19, 1824; the material clause of which is as follows:

“First. I give and devise to my son James Christie, his heirs and assigns, all the remaining part of the south half of west lot number ten in the seventh range, and the south half of the east lot of farm number ten in the eighth range of farms in the town of Middlesex, aforesaid, which I have not heretofore conveyed to him by deed to him, the said James Christie. I also give and devise to my son Gilbert Christie, his heirs and assigns, so much land, to be taken from that now owned by me, adjoining that which I have heretofore conveyed by deed to him, as will be sufficient to make the same quantity, if added to that heretofore deeded to him by me, as that shall be which I have heretofore deeded to my son James Christie, added to that herein above given and devised to him, the said James Christie. I also give and devise to my daughter, Abigail Cook, wife of Burnet Cook, and her heirs and assigns, the south half of the east lot of farm number nine in the eighth range of farms in the town of Middlesex, aforesaid, containing ninety acres, one rood and four perches of land. I also give and devise to my two sons David Christie and William Christie, their heirs and assigns, one hundred acres of land, to be taken off the south side of that piece or parcel of land conveyed to me by deed executed by Rufus Gale and Ruth, his wife, bearing date the twenty-second day of February, in the year of our Lord one thousand eight hundred and thirteen. I also give and devise to my grandson, Andrew Christie, the son of Gilbert Christie, one hundred acres of land, to be taken adjoining land above given and devised herein to Gilbert Christie, and the remainder of land belonging to me of the farm conveyed by Rufus Gale and

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Ruth, his wife, as above stated, I hereby give and devise to my grandson, David Christie, the son of James Christie, and his heirs and assigns."

Plaintiff is the grandson of David Christie referred to in said clause.

Testator executed a codicil February 23, 1824, by which he gave to his wife, in lieu of the provisions in the will, among other things, a life estate in the 100 acres devised to Andrew Christie. This was the land in question. The testator died and the will was admitted to probate in 1824. Andrew Christie and the widow of the testator died before the commencement of the action. It was admitted "that there was a residue of about sixteen acres of the Gale farm over and above the quantity specifically devised and which the plaintiff took under said will." At the close of plaintiff's evidence, on motion of defendant's attorney, the court granted a nonsuit. Exceptions were ordered to be heard at first instance at General Term.

*H. L. Comstock* for the appellant. At common law under a devise generally, without words of inheritance, limitation or perpetuity, the devisee took only a life estate. (*Wells v. Wells*, 9 J. R., 222; *Newkirk v. Embler*, 14 id., 198; *Ferris v. Smith*, 17 id., 221; *Wheaton v. Andress*, 23 Wend., 452; *Burlington v. Belding*, 21 id., 463; *Harvey v. Olmstead*, 1 N. Y., 483; *Mesick v. New*, 7 id., 163; *Edwards v. Bishop*, 4 id., 61; *Olmstead v. Olmstead*, id., 56; *Wright v. Dean*, 10 Wheat., 204; *Child v. Wright*, 8 D. & E., 64; *Denn v. Gaskin*, Cowp., 657; *Gooderight v. Barron*, 11 East, 220.) Prior to the time the Revised Statutes took effect the common-law rule prevailed. (*Harvey v. Olmstead*, 1 N. Y., 483; *Mesick v. New*, 7 id., 163; *Wheaton v. Andress*, 23 Wend., 452.) The Revised Statutes changed this rule but provided that its provisions should not be construed so as to affect the construction of, or impair the validity of the execution of, any will made before they took effect. (2 R. S., 68, § 70.) The estate of Andrew Christie was not enlarged into a fee by being a remainder limited upon a previous life estate. (*Van Derzee*

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Opinion of the Court, per CHURCH, Ch. J.

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v. *Van Derzee*, 30 Barb., 331; *Edwards v. Bishop*, 4 N. Y., 61; *Hay v. Earl of Coventry*, 2 D. & E., 83; *Doe v. Clark*, 5 B. & P., 343; *Comptor v. Comptor*, 9 East, 367; *Doe v. Wright*, 8 D. & E., 64; *Ferrie v. Smith*, 17 J. R., 221; *Harding v. Roberts*, 29 Eng. L. and Eq., 451.)

*David B. Prosser* for the respondent. Andrew, the grandson, took the fee of the 100 acres, and there was no remainder as to that. (*Westcott v. Cady*, 5 J. Ch., 343; *Hone v. Van Schaick*, 3 Barb. Ch., 488; 4 Kent's Com., 537, 541; *Wright v. Crandall*, 9 East, 400; *Charter v. Otis*, 41 Barb., 525.)

CHURCH, Ch. J. The title of the plaintiff to the land in controversy depends upon the construction to be given to the will of Andrew Christie, executed and admitted to probate in 1824. The will, after making four devises of parcels of real estate to his children, respectively, with proper words of inheritance to convey the fee, contains the following clauses: "I also give and devise to my grandson Andrew Christie, the son of Gilbert Christie, one hundred acres of land to be taken adjoining land above given and devised herein to Gilbert Christie. And the *remainder of land* belonging to me of the farm conveyed by Rufus Gale and Ruth, his wife, as above stated. I hereby devise to my grandson David Christie, the son of James Christie, and his heirs and assigns." By a codicil made a few days subsequent to the will, a life estate in the said 100 acres, which is the land in dispute, was devised to the wife. It was admitted on the trial, "that there was a residue of about sixteen acres of the Gale farm, over and above the quantity specifically devised and which the plaintiff took under the will," etc. The widow and Andrew Christie, the grandson, died before the commencement of the action. Assuming, that the 100 acres devised to the grandson Andrew Christie, was a part of the Gale farm, as it probably was, and assuming also that the devise to him conveyed only a life estate and not a fee, the question is, whether the clause devising "the remainder of land," belonging to the testator of the Gale farm to the plaintiff, carried the remain-

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Opinion of the Court, per CHURCH, Ch. J.

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der of the estate, after the two successive life estates in the said 100 acres. It seems to me quite clear that it did not.

The general rule is, that the language in a will is to be construed in the ordinary and popular sense. The testator had devised several parcels of the Gale farm, and owned sixteen acres not devised, which it is presumed he knew, and when he devised "the remainder of land" in that farm, the obvious meaning is, that he intended by that clause to devise such residue. The general signification of the word remainder is what is left after separating a part, and it was evidently used by the testator in this sense in respect to a remaining parcel of land. The word has a fixed legal meaning when applied to a remaining interest in an estate, after other interests have been carved out or separated, but in this clause it was not intended to thus apply. The remainder of land refers to property not before devised or specified and not to a remainder of estate in that which had been devised. The clause did operate to convey a fee to sixteen acres of land which was left of the Gale farm, and it cannot be supposed that the testator intended by the use of this phrase "remainder of land" to convey a fee in sixteen acres and also a remainder of estate in other land after successive life estates. We must presume that other language would have been employed. If the "rest and residue of the estate" or the "remainder of the estate" had been devised to the plaintiff, the question would be quite different, but it is the remainder of land in the Gale farm not before mentioned, which was evidently intended. The words are descriptive of property devised and not of the quantity of interest. The plaintiff, therefore, has no title by the will to the land in question and his action must fail.

It is unnecessary in this case to consider the question whether the grandson, Andrew Christie, took a fee or a life estate. If the latter, the will did not give the plaintiff the remainder of the estate.

The judgment must be affirmed.

All concur.

Judgment affirmed.

## Statement of case.

## GEORGE FOWLER et al., Respondents, v. THE NEW YORK GOLD EXCHANGE BANK, Appellant.

Plaintiffs' contracted to sell \$50,000 of gold at 141½ currency, to be delivered September 24, 1869; defendant was the common agent for dealers in gold, employed in the settlement of their contracts. Plaintiffs did not furnish the gold to fulfill their contract, but defendant furnished and delivered it, receiving the currency agreed to be paid therefor. Plaintiffs thereafter tendered to defendant the amount of gold so delivered and demanded the currency received, which the latter refused to pay. In an action to recover the same, *held*, that while defendant was not bound to perform the contract on behalf of plaintiffs, as they did not furnish the gold; yet, having done so, it was estopped from denying plaintiffs' right to the benefit of the contract; that plaintiffs, by asserting their claim to the money received, adopted and ratified the acts of defendant, and the rights and obligations of the parties were to be determined by the rules governing the relation of principal and agent; that while defendant could not make a profit to itself, yet having acted in good faith it could not be compelled to suffer a loss; that the gold furnished would not be treated as a loan, but defendant was entitled to retain as an indemnity for furnishing it so much of the currency received as the gold was actually worth at the time, and plaintiffs were only entitled to the surplus; also that it was immaterial whether defendant bought the gold for delivery or furnished it from its own funds.

Evidence was given tending to show that the delivery was from gold of dealers deposited in defendant's clearing department, for which it had accounted. Evidence was offered on its part as to the actual cost of the gold, and of the performance by it of the contract, which was objected to and excluded. *Held*, error.

*Fowler v. The Gold Exchange Bank* (6 Hun, 186) reversed.

(Argued September 27, 1876; decided October 6, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 6 Hun, 186.)

This action was brought to recover \$76,025 currency alleged to have been received by defendant as the purchase-price of \$50,000 of gold sold and delivered by it as agent of plaintiffs.

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Statement of case.

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On the 23d of September, 1869, James Brown & Co., who were gold and exchange brokers in the city of New York, for and on behalf of the plaintiffs, agreed to sell and deliver \$50,000 in gold coin to Chase, McClure & Co., who acted in the transaction for Chapin, Bowen & Day, who were also engaged in the same business, at one forty-one and a quarter cents in currency for each dollar of the gold. By the terms of the agreement made, the gold was to be delivered and the currency received on the twenty-fourth of September. These three firms of brokers were at the time members of the Gold Exchange of the city of New York, by one of whose rules or regulations the contracts of its members for the sale of gold were to be settled or cleared by the defendant; and to enable it to do that, notes were delivered by the vendors and vendees respectively, addressed to the cashier of the defendant, by which he was informed that the vendors would settle through the clearing department of the bank, on a specified day, the amount of gold agreed to be sold, and the vendees, in like form, informed him of the currency they were to pay or deliver as the price of the gold. On each day in which the members had settlements or exchanges of this nature to be made through the intervention of the defendant, an account of all of them was also to be delivered to the defendant before half-past twelve o'clock in the day, and the amount of gold or currency, as the case might require, necessary to balance all the transactions mentioned in the account, was also to be paid or delivered with it to the officers of the defendant. The day on which the contract was to be, by its terms, performed proved to be one of uncommon excitement among gold dealers and very great and rapid fluctuations in prices, so much so that it has since been known and designated in that business as "Black Friday." The president of the defendant requested its customers to consummate and settle their sales and purchases between themselves, without the interposition of the defendant. James Brown & Co., the vendors of the gold, on behalf of the plaintiffs, were informed of this request, and they

## Statement of case.

neither delivered the notice received by them from Chase, McClure & Co. to the cashier of the defendant, nor the general statement or account of their transactions in gold, which were to be cleared and settled on that day, nor did they pay in or deliver to defendant the gold required to perform the contract; but Chapin, Bowen & Day received the notice which James Brown & Co. had delivered when the agreement was made, and delivered it to the cashier of the defendant, with an account of their transactions and the balance due which was required to clear and settle them. The defendant in this way received the price of the gold, to wit, \$70,625, in currency, from Chapin, Bowen & Day; and, without any further authority from Brown & Co. than that contained in their notice given to Chase, McClure & Co., delivered the \$50,000 in gold.

The evidence showed that James Brown & Co. soon after applied to Chase, McClure & Co. for a performance of the agreement, and then ascertained that Brown & Co.'s notice to the cashier of the defendant had passed into the hands of Chapin, Bowen & Day, who had delivered it to the bank with the currency required, and had received the gold. James Brown & Co. thereupon applied to the defendant for the currency it had received upon their contract, as the contract-price of the gold, and offered to deliver to it the \$50,000 in gold. On the 29th September, 1869, defendant's affairs passed into the hands of a receiver; and, in reply to the application, Brown & Co. were informed that, for this reason, nothing could be done. Plaintiffs, as the principals and assignees of James Brown & Co., on the 30th of December, 1869, made a formal tender of the gold, and demanded the currency paid the defendant. That not being complied with, this action was brought for the recovery of the amount, on the theory that the advancement of the gold was substantially a loan of it by the defendant to James Brown & Co., for the plaintiffs, and that view was taken of the transaction by the referee.

The evidence tended to show, and the referee found, that the gold so supplied and delivered by defendant "was taken

## Statement of case.

and obtained by it from the general fund of the gold coin received by it from the different dealers in the said clearing department of its business, and paid into the said defendant, as such clearing-house, under and pursuant to the said clearing rules and regulations."

Upon the trial, defendant's president, as a witness on its behalf, after testifying upon this subject, and that the bank did not own any gold, was asked various questions as to the cost to the bank of the gold delivered by it, and the cost of the performance of the contract. These were objected to, and excluded under exception.

Further facts appear in the opinion.

*S. P. Nash* for the appellant. Defendant was entitled to have made good any depreciation in the value of the gold advanced by it. (*Porter v. Rose*, 12 J. R., 290; *Coonley v. Anderson*, 1 Hill, 519; *Dunkham v. Mann*, 4 Seld., 508; *Kimne v. Ford*, 43 N. Y., 587; *Peabody v. Speyers*, 56 id., 230; *Cornell v. Moulton*, 3 Den., 12; *Thompson v. Ketchum*, 8 J. R., 189; *Herrick v. Bennett*, id., 291; *Howland v. Willett*, 3 Sandf., 607; *Graves v. Porter*, 11 Barb., 592; *Peck v. Armstrong*, 38 id., 215; *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y., 67; *Rawson v. Holland*, id. 611.) The offer of September twenty-ninth to replace the gold was too late. (*Jones v. Fowler*, 1 Swe., 5; 2 Parsons on Con., 661, 662; *Hedges v. H. R. R. Co.*, 49 N. Y., 223; *Hape v. Lawrence*, 50 Barb., 258.) The transaction was not in any sense a bailment. (Story on Bail, §§ 47, 283; *Jones on Bail*, 64; 2 Kent's Com., 573; *Foster v. Pettibone*, 3 Seld., 433; *Norton v. Woodruff*, 2 N. Y., 153; *S. A. Bank v. Randall*, L. R., 3 P. C., 101; *Cooke v. Davis*, 53 N. Y., 318.)

*F. F. Marbury* for the respondents. All that plaintiffs were obliged to return defendant was an equal amount of the gold without reference to any fluctuations in price or market value. (*Dykes v. Allen*, 7 Hill, 498; *Dry Dock Bank v. Am. L. Ins. and T. Co.*, 3 N. Y., 355.)



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Opinion of the Court, per ALLEN, J.

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ALLEN, J. The defendant in this and similar transactions was but the common agent of the dealers in gold by whom it was employed in the settlement of their contracts by effecting an exchange of gold for currency between the parties. As the agent of the seller of the gold, it received from him the gold sold and delivered it to the buyer for whom it had received it, receiving in turn from him the currency and paying it to the seller for whom it was received. Notwithstanding the multifarious transactions of each day and the number of individuals and firms concerned, the result of all the transactions consummated through the instrumentality of the defendant was the making this exchange of commodities between individual dealers. The regulations of the defendant and of the gold exchange in evidence, and the forms and machinery adopted, had for their only object and result the accomplishment of this exchange between buyer and seller; and notwithstanding the complexity of the dealings and accounts between the many dealers and the combinations and complications necessarily growing out of the daily transactions when brought together, the process was a very simple one for the settlement of separate and distinct contracts, as if but a single contract was to be settled. As between the several dealers and the defendant, each contract was an individual transaction, in respect to which the bank was the agent of and responsible to each of the parties to it, independent of and distinct from every other transaction. The bank was not and could not be a dealer in gold for its own account and for its own profit in any transaction in which it represented other parties. The plaintiffs are compelled to rely upon the fact that the defendant, in delivering the gold to the purchasers and receiving from them the pay therefor, acted solely as their agent in carrying out their contract theretofore made and solvable on that day. Hence, they have averred the agency and that the acts done by the defendant were done as their agent, and the facts were so found by the referee. If the defendant was not and did not in fact act as the agent of the plaintiffs, the latter have no claim upon it, for there was no

other relation existing between them upon which the plaintiffs could predicate any claim to the fruit of its dealings. It is true that the plaintiffs, not having furnished the gold for delivery, or complied with other regulations of the defendant, the latter was not bound to carry out the contract in their behalf; but, consenting to do so, it waived the conditions with which the plaintiffs had failed to comply and is estopped now from asserting them or from denying the right of the plaintiffs to the benefit of the contract. Whether the plaintiffs, notwithstanding their order and direction to the defendant to deliver the gold, were bound to adopt the delivery of gold not furnished by them, need not be determined. They have, by asserting their claim to the money received for the gold, adopted and ratified the acts of the defendant, and in so doing have adopted all the means and instrumentalities resorted to by the defendant and all acts done by it in the performance of the contract in their behalf. They could not adopt a part of the acts of the defendant without adopting all. A ratification of the delivery is a confirmation of all that was done by the agent in making such delivery, or providing the gold for delivery. (*Farmers' Loan and Trust Company v. Walworth*, 1 Comst., 433; *Crans v. Hunter*, 28 N. Y., 389; *Corning v. Southland*, 3 Hill, 552.) The relation of the parties as principal and agent in the transaction being conceded, the rights and obligations of the parties must be determined by the rules of law applicable to and governing that relation. The court, in the absence of evidence authorizing it, cannot impose upon them the duties and liabilities growing out of any other relation, as, for instance, that between buyer and seller, or borrower and lender. The parties, by their own conventional arrangement, have determined what relation should exist between them, and neither party, without the consent of the other, can change that relation so as to vary their legal rights; nor can the courts permit either party, without the assent of the other, to occupy a different relation, or to assume a position inconsistent with the relation of principal and agent. The defendant could not, at its

volition, elect to regard the gold which it had delivered, as the agent of the plaintiffs, as either sold or loaned to the latter; neither can the plaintiffs, in adopting the delivery, elect to regard the gold thus delivered as either sold or loaned to them at their option. There is the same reason for holding that the gold was first sold to the plaintiffs at the market-price and then delivered as their gold, as for holding that it was loaned and then delivered. Individuals under contract to deliver gold, may either buy or borrow the same for delivery, and when resorting to either process their contracts will be judged with respect to the laws applicable to them. But it was a mistake to single out one of several contracts which might have been made between parties acting *sui juris* and hold the parties, without their assent to such contract, and apply to it the usages and customs which might be applied to contracts regularly made. It is assumed by the learned judge delivering the opinion of the court below that the defendant delivered its own gold, and that, having done so, it must be treated as a loan of the gold to the plaintiffs. But no good reason is asserted for calling it a loan rather than a sale. If a loan, it would not have been necessarily a naked loan, subject only to the usual conditions which attach to loans in the absence of special agreements; but the parties might, had they met and agreed for a loan, have provided for the compensation, the security for its return, the time and manner of its return and the consequences of a rise or fall in the price, all of which are not infrequently the subjects of contract and special agreement. The same learned judge concedes that a difference would exist in favor of the defendant if the gold had been purchased by it, or procured from some other source by which it was subjected to expense on account of the transaction and its conduct as agent for the plaintiffs; and says that upon the ratification of an act of that nature the principal would probably become bound to protect and fully reimburse the agent. But the agency being conceded, the agent is alike entitled to indemnity whether the gold is supplied from one source or another. Any loss result-

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Opinion of the Court, per ALLEN, J.

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ing from the transaction could no more be made to fall upon the agent in the one case than in the other. The rule is too well settled to be now questioned, that an agent cannot be permitted to make a profit to himself in his dealings in behalf of his principal, and, acting in good faith, will not be compelled to suffer loss. (Story on Agency, §§ 207, 214, 339.) The case is a very plain one. If the defendant furnished gold of its own for the delivery it was only entitled to claim of the plaintiffs so much of the currency received for it as it was actually worth at the time, and so much of the money it might have retained as an indemnity for furnishing it. This money it might have used at once to replace the gold and was entitled to it for that purpose. It could not have put the currency in its safe, and upon a rise in the price of gold demanded of the plaintiffs the increased value, and thus made a profit to itself. Neither could the plaintiffs, upon a decline in the price of gold, claim from the defendant the currency received by it, and cancel their obligations by the delivery of gold bearing a less price in market than at the time of the delivery, and thus inflict a loss upon the agent acting in good faith and in their interest. Had the defendant bought the gold, it would only have been entitled to demand its actual cost; and any profit in the purchase would have been for the benefit of the principal. This principle of indemnity to agents was applied by this court in *Cameron v. Durkheim* (55 N. Y., 425), in which brokers had made a settlement of a contract for the sale and delivery of gold by agreeing upon and paying a difference between the contract-price and the market-value of the commodity; and it was expressly held that if the settlement was made in good faith and a proper exercise of the power conferred, they should be protected. Here no question is made as to the good faith of the agent. Its acts are ratified by bringing this action. (See also *Powell v. Trustees of Newburgh*, 19 J. R., 284.) An agent is entitled to be indemnified against all damages and losses which are incurred by him and all cost to which he may be subjected in the course of his agency without fault on his part.

Whatever may be the form of the transaction, the law yields full indemnity to the agent as against the principal. (*Ramsay v. Gardner*, 11 J. R., 439; *Exall v. Patridge*, 8 T. R., 308; *Child v. Morley*, id., 610; *D'Arcy v. Lyle*, 5 Binney, 441; *Greene v. Goddard*, 9 Metc., 212.) It is not claimed that gold is to be distinguished in this transaction from any other commodity or article of commerce. It was treated by the parties as an article of merchandise, the subject of purchase and sale, and not as current coin, a part of the currency of the land, and this practice and contracts based upon it are recognized as lawful by the courts and by the government. (*Peabody v. Speyers*, 56 N. Y., 230; *Cooks v. Davis*, 53 id., 318.) If the delivery had been of wheat instead of gold, the defendant representing the plaintiffs as their agent in making the delivery, furnishing the wheat for them, they having failed to supply it, so much of the currency as was received in payment as would at the time of delivery have indemnified the defendant, would have belonged to it, and the plaintiffs would only have been entitled to receive the surplus as their profit. The cost to the defendant would have been the same whether it had furnished the wheat, which was worth to it at the time the market-price and no more and no less, or had bought the wheat, paying for it the market-price, and delivered it upon the plaintiff's contract. Whether the wheat was bought to meet the emergency or had been bought before, without reference to the plaintiff's necessities, would make no difference in the legal rights or equities of the parties. It would have made no difference whether the defendant took the wheat from its own granary or procured it from other sources. The benefit to the plaintiffs and actual contribution and loss of the defendant would be the same.

It was assumed by the Supreme Court that the gold delivered was the property of the defendant, and taken from its coffers; but that is not conclusively proved. There was room for the jury to find that the delivery was made from the gold of dealers, deposited in the clearing department of the bank for delivery upon contracts in the customary method, and that

the defendant was liable to account and had accounted for it, and in that view the question was material as to what was the actual cost to the defendant of the gold delivered, and, in another form, what the cost of the performance of the contract was to the defendant, and should have been answered. It was error to exclude the evidence, as upon the whole case a fair case was made for the jury, had it been material, as to the source from which the gold came; so as upon any theory, to raise a proper question as to the character and extent of the indemnity to which the defendant was entitled.

But, in my view of the case, the error of the court below was radical in making the rights and obligations of the parties to depend upon the rules of law applicable to borrower and lender of articles to be returned in kind, rather than to principal and agent, in which the latter is entitled to indemnity irrespective of the form of the transaction. There is no question before us as to the sufficiency of the pleadings, and none was made upon the trial that the evidence excluded was incompetent under the pleadings.

The fact that the defendant suggested to its dealers that they should, under the peculiar circumstances of that day, known in the traditions of Wall street as "Black Friday," settle their contracts between themselves and not through the agency of the bank, is wholly immaterial. The contract was to be performed at and through the instrumentality of the bank, and the purchaser did not assent to a settlement elsewhere, but demanded a performance at the bank and by the defendant as the common agent of both parties. The defendant did not tender or deliver the gold elsewhere to the purchaser, but adopts the performance by the defendant, and, for aught we know, they may have sold the gold which they had for delivery under the contract, in the earlier hours of the day, at the almost fabulous prices then ruling, and thus profited by making default in their contract actually performed on their behalf by the defendant.

Neither is there any question respecting the tender or its sufficiency, or the waiver of any rights by the defendant

by not asserting its legal rights as now claimed, at the time of the tender. It was not a case for a tender and the plaintiffs were not entitled to demand of the defendant the whole amount received for the gold delivered. They were only entitled to the surplus after deducting the amount to which the defendant was entitled by way of indemnity. In other words, they were entitled to an accounting by their agent and to a payment of any balance that should be due them upon the transaction. Taking the price of gold as it appears by the record to have been at the hour of the performance of this contract, the gold was furnished at a cost of about 135, which would entitle the plaintiffs to something over six per cent upon \$50,000 delivered; and if they recover that sum they will recover all that they would have made by performing the contract in person and with their own gold; and, unless it appears that in some legitimate way the defendant was compelled to pay more for the gold delivered, the agent will be fully indemnified and equal and exact justice done between the parties, in strict accordance with the well-established rules of law governing transactions between principal and agent. But if the rule adopted by the court below is adhered to, the agent, without fault on its part, will be made to sustain a loss of some fifteen per cent upon the \$50,000, which it could not have avoided except by refusing to perform the contract in behalf of the principals and leaving them to abide by the consequences of their own default, and the plaintiffs will have made several thousand dollars by leaving their agent to stand in the breach and take the consequences of their default. This would be grossly unjust, as well as a perversion of legal principles. A fluctuation in the price of gold in the other direction might, by the application of the same rule, have compelled the plaintiffs to deliver gold worth and costing much more than the price at which it was sold by them, thus imposing upon them a loss on a contract upon which there was an actual profit and giving to the agent a profit to which it was not entitled.

The judgment must be reversed and a new trial granted.

All concur; CHURCH, Ch. J., in result.

Judgment reversed.

DENMARK P. COLLINS et al. v. GEORGE F. DREW et al., Appellants, THE OCEANIC STEAM NAVIGATION COMPANY et al., Respondents.

Whatsoever is comprehended in the terms "wharves, piers, bulk-heads and bridges, and other structures connected therewith," as used in the act of 1872 in relation to mechanics' liens (chap. 669, Laws of 1872) is exclusively provided for by that law; and to perfect a lien, whether for labor or materials, its requirement in regard to the filing thereof must be followed.

The term "other structures connected therewith" includes all structures connected with a wharf, pier, etc., and necessary for its proper use.

Accordingly, *held*, that "sheds" erected upon piers in the city of New York, of a steam navigation company, for offices and other purposes of the company were included in that term, and that a lien for materials furnished for, and used in, the erection of such "sheds," not filed within thirty days from the time when the materials were delivered was invalid, although filed within the time prescribed by the general lien law of that city.

(Argued September 29, 1876 ; decided October 6, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas of the city and county of New York affirming a judgment entered upon the report of a referee.

This action was brought to foreclose a mechanic's lien.

The facts appear sufficiently in the opinion.

*B. F. Watson* for the appellants.

*Tunis G. Bergen, Jr.*, and *Hugh Porter* for the respondents. The sheds erected on defendants' piers came under the provisions of chapter 669, Laws of 1872. (Laws 1875, chap. 249, § 1; Potter's Dwarries, 144, Rule 7.)

EARL, J. Prior to February, 1874, the Ocean Steam Navigation Company owned Piers Nos. 51 and 52, on the North River in the city of New York, and made a contract with defendant Wood to repair the piers and to erect certain structures thereon and connected therewith. Before February



tenth, Wood had completed his contract and there was due him, upwards of \$5,000. Soon thereafter the plaintiff and some of the defendants filed liens against the piers under the lien laws applicable to the city of New York, and some of the defendants, as creditors of Wood, attached the debt due him from the Steam Navigation Company. The plaintiffs commenced this action to foreclose their lien and made all the persons defendants who claimed a lien upon or interest in the sum so due Wood, and the controversy upon the trial was as to the priority and regularity of liens. It appeared that defendants Drew and Bucki furnished material to Wood to complete his contract and that the last material was furnished more than thirty days, but less than three months, before they filed their notice of lien. The referee held that they acquired no lien because they filed their notice too late, and it is this decision which they complain of upon this appeal.

The material furnished by the appellants was used in erecting upon the piers what in the notice of liens and in Wood's contract are called sheds, and they were to be used for the offices and other purposes of the company. Wood's contract was for erecting sheds upon the piers and widening, lengthening and repairing the piers.

By the mechanics lien law applicable to the city of New York (chapter 500, of the Laws of 1863), a person performing labor or furnishing material towards "the erection of, or in altering, improving or repairing of any building or buildings, or the appurtenances thereto in the city of New York," could acquire a lien upon "such house or building, and the appurtenances and lot on which the same shall stand" by a compliance with that law. Among other things, he was required to file a notice of lien within three months after the work was done or material furnished. The appellants claim that their case is governed by this law, and, hence, that their notice of lien was filed in time. These sheds upon the piers could doubtless be called buildings within the meaning of this law, and if there were no other statute, the contention of the appellants could not well be answered.

But, in 1872, by an act (chap. 669) of that year, it was provided that "all the provisions of the laws relating to mechanics' liens heretofore passed, shall apply to wharves, piers, bulk-heads and bridges, and material furnished therefor, and labor performed in constructing said wharves, piers, bulk-heads and bridges, and other structures connected therewith, and the time within which said liens may be filed, shall be thirty days" from the time when the last work shall have been performed, or the material delivered.

The former statute was not comprehensive enough to cover wharves, piers, bulk-heads, and bridges, and the main purpose of this statute was to extend the lien law to those structures with an alteration of the time in which the liens were to be filed. And as other structures are necessarily connected with wharves and piers to make them useful, this statute also extends to them. Whatever is comprehended in the terms "wharves, piers, bulk-heads and bridges, and other structures connected therewith," is provided for exclusively by this law, and the only real difficulty in this case is to determine what is meant by the words "other structures connected therewith?" These words were intended to cover something not strictly included in the terms before used. A lien might be filed on account of a pier not only, but other structures connected therewith. What other structures? All structures on or connected with the pier, and necessary for its proper use. These sheds were built upon the piers, and were quite essential to their use, and, in a broad sense, were really a part of them.

It is claimed by the appellants that the law of 1872 was not intended to extend the lien law to any thing provided for by the former law, and, hence, as these sheds could properly be called buildings, the lien as to them is to be governed exclusively by the prior law. This claim cannot be allowed. The main purpose of the law was undoubtedly to provide for liens upon wharves, piers, bulk-heads and bridges, but as other structures are necessarily connected with them, it was intended to cover the whole subject, so that if a builder took a contract

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to build a pier with all its necessary sheds and fixtures he could have his entire remedy under the one law. If a structure connected with a pier happened also to be a building, the case would still be governed by the later law. This construction will be found most convenient in practice, and will obviate the difficulty which might often arise of determining whether a building was a mere structure, or whether a structure was a building, within the meaning of the prior act.

It is also claimed that the statute of 1872 applies only to the case of work performed upon such "other structures," and not to materials furnished for constructing them. To sustain this claim requires a too critical and narrow construction of the statute. It was clearly intended, although the language used is quite inapt, that the whole statute, in all its provisions should, as the prior statute does, apply alike to the case of labor and materials.

While it is plain that much can be said in favor of the construction of the statute of 1872, contended for by the appellants, and that the intention of the legislature, in the language used, is not entirely free from doubt, we should not, upon a mere question of at most doubtful construction, reverse the unanimous decision of a court in which the lien laws applicable to the city of New York are mainly administered, particularly when the construction put upon the statute by that court will, on the whole, subserve the beneficent ends of the statute as well at least as any other.

We are therefore of opinion that the judgment below is right, and should be affirmed, with costs.

All concur.

Judgment affirmed.

## Statement of case.

JOHN D. SPINNER, Respondent, v. THE NEW YORK CENTRAL  
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Under the provisions of the general railroad act (§ 44, chap 140, Laws of 1850 ; § 8, chap. 232, Laws of 1854), requiring every corporation formed under it to erect and maintain fences on the sides of its road, no exception is made or permission given for openings or gates for the use of the corporation, or its customers or the public generally, but only for the use of adjoining proprietors ; and if it permits or acquiesces in the use, in its business by its customers, of a gate constructed by it at a farm crossing, so that the gate does not serve the end of a fence, it is in default.

Negligence cannot be imputed to a person simply from the fact that his beasts have escaped from his well fenced field on to a railroad track. Plaintiff's cattle escaped from his inclosure in the night time on to the highway, and thence through a gate, at the side of defendant's road, which had been left open, upon its track, where they were struck by a passing train, some killed and others injured. The gate, for several years, had been used almost daily in the business of loading and unloading freight ; vehicles delivering or taking goods passing in or out thereat. In this business defendant's servants had helped. In consequence the gate was often left open at the close of the day's business, and would be closed in the evening, or at midnight, by defendant's servants. The adjoining proprietor, for whose use the gate was originally erected, had not used it for six weeks prior to the accident, and had no knowledge of its use for his purposes on the preceding day. In an action to recover damages, *held*, that the evidence was sufficient to authorize an inference by the jury, that the gate was open by reason of its use by defendant's customers during that day, or some day shortly prior ; that defendant had sufficient notice that the gateway had been diverted from its original purpose to a common passageway for its customers, and that it was often left open in consequence thereof ; that the opening of it at all, by its assent or acquiescence, was in contravention of said statute ; and that if such use of the gate was not of itself sufficient to charge defendant, it was bound to see that when the use of it for the day was over it was well closed, and for a neglect of this duty it was liable.

(Argued September 29, 1876 ; decided October 6, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon a verdict, and

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Statement of case.

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affirming an order denying a motion for a new trial. (Reported below, 6 Hun, 600.)

This action was brought to recover damages for injuries to plaintiff's cattle.

The evidence tended to show these facts :

In September, 1872, the plaintiff was in possession of a farm of land near Ilion, in the county of Herkimer, on which he had a herd of cattle. The defendant's railroad ran along the southerly side of the farm adjoining a public highway which lay between the railroad and the farm. Between the highway and the railroad the defendant had built a fence, and in the fence, near the house of one Farrington, a gate was placed to enable him to pass to and from a part of his farm, lying on the opposite side of the railroad from his house. Defendant's depot at Ilion was some distance west of this gate, but from 1864 the gate had been used in defendant's business. Cars were run down by its employes on the track near to it almost daily, empty ones to receive freight, and loaded ones to be discharged, and wagons and carts engaged in loading and unloading, passed in and out at the gate. Defendant's employes assisted in loading and unloading and left freight there to be taken away ; they were accustomed to close the gate after business hours. In the night of the 30th of September, 1872, the plaintiff's fence was in some way broken down, and his cattle passed through it on to the highway, and the gate being open, the cattle passed through on to the track ; some of them were injured by trains passing, and others were killed.

No evidence was given showing that defendant's servant's closed the gate on the night in question.

The court instructed the jury that if the defendant's agents or servants carelessly left open the gate on the night in question, then defendant was liable for the damages sustained by the plaintiff.

The court refused to charge the jury that the defendant had sufficiently erected and maintained a fence along its road, save with the qualification that if it had carelessly omitted to

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shut the gate it had not complied with the requirement of the statute.

The court refused to charge that the mere presence of these cattle on the defendant's road would bar the right of recovery.

The court refused to charge that plaintiff's cattle being upon the defendant's track without any evidence of right or authority from defendant, was conclusive evidence of negligence. To all of which rulings defendant's counsel duly excepted.

Further facts appear in the opinion.

*S. W. Jackson* for the appellant. Plaintiff was guilty of contributory negligence in allowing his cattle to trespass upon defendant's track. (*Tonawanda R. R. Co. v. Munger* 5 Denio, 255; 4 N. Y., 349; *Clark v. Syr. and U. R. R. Co.*, 11 Barb., 112; *Waldron v. R. and S. R. R. Co.*, 8 id., 390; *Suydam v. Moore*, id., 358; *Hance v. C. and S. R. R. Co.*, 26 N. Y., 426.) Plaintiff was bound to show, in order to recover, that his cattle got on the track by means of a defect in the fence. (*Brooks v. N. Y. and E. R. R. Co.*, 13 Barb., 594; *Murray v. N. Y. C. R. R. Co.*, 4 Keyes, 297.) The burden of proof was on plaintiff to show that his cattle were rightfully on defendant's road. (*Reynold v. N. Y. C. and H. R. R. Co.*, 58 N. Y., 250.)

*Amos H. Prescott* for the respondent. The bare presence of plaintiff's cattle on defendant's track would prevent a recovery. (13 N. Y., 42; 16 id., 476; 34 id., 427; 35 id., 641; 38 id., 433; 33 id., 369; 4 Keyes, 274; 2 T. & C., 388; 4 Hun, 344.) Defendant was bound to keep the gate closed so as to prevent cattle going on its track. (13 N. Y., 42; *Murray v. N. Y. C. R. R. Co.*, 3 Abb. Ct. App. Dec., 339; *Munch v. N. Y. C. R. R. Co.*, 29 Barb., 648; *McDowell v. N. Y. C. R. R. Co.*, 37 id., 196; *Staats v. H. R. R. R. Co.*, 33 How., 139.)

FOLGER, J. The plaintiff may not maintain his action, unless the statute law of the State is sufficient therefor.

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Opinion of the Court, per FOLGER, J.

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Though his beasts escaped from a well fenced field, without any actual carelessness on his part, when they came upon the defendant's track they were trespassers there, and the defendant owed him no duty, save not to willfully or recklessly injure them. (*Munger v. Tonawanda R. R. Co.*, 4 N. Y., 349.)

The statute law has modified that rule to some extent. By it, the defendant was bound to build and keep in good repair fences along the sides of the track, where necessary to prevent cattle from getting on to it from adjoining lands, with openings, or gates or bars therein, for the use of the proprietor of the lands adjoining its track. (Gen. Railroad Acts, chap. 140, Laws of 1850, § 44, p. 233; Chap. 282, Laws of 1854, § 8, p. 611.) In this case the defendant chose, at this place, to put up a gate for the use of the proprietor. It is to be observed of this requirement of the statute, that the general and primary duty imposed, is to maintain fences along the sides of the track; and that the provision for openings, gates, or bars, is as an exception therefrom, or a permission in a given case, to wit, for the use of a proprietor of adjoining lands. No exception is made, or permission given, for gates, etc., for the use of the railroad company, or its customers, or the public generally. Against every one but a proprietor of adjoining lands a fence must be kept up, or that which will serve the purpose of one, which a gate or bars will do when kept closed. (See 16 N. Y., 430, 476.) It has been held, in the Supreme Court, that if a fence is thrown down, or blown down, or pulled down by a trespasser, the railroad company not having notice thereof, is not liable because it does not at once put it up again, and that it has a reasonable time in which to repair it. (*McDowell v. N. Y. Cent. R. R. Co.*, 37 Barb., 196.) And this seems to be a rational rule, and may be applied also to the case of a farm crossing-gate left open. So the inquiry here is, whether the gate in this case, had been so used, and for such length of time, and by the defendant, or with its sanction and invitation, as to warrant a finding by the jury that the defendant was negligent of the duty imposed by the statute.

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Any question of negligence in the plaintiff is out of the question, as matter of fact, for the jury were charged that if they found negligence on the part of the plaintiff then he was in fault and could not recover. The verdict for the plaintiff negatived any negligence in fact in him. If the defendant is brought within the provisions of the statutes by the facts of the case, then the law will not impute negligence to the plaintiff merely from the fact that his beasts have escaped from his well-fenced field. (See *Corwin v. N. Y. and Erie Railway Co.*, 13 N. Y., 42, *per MARVIN and DENIO*, JJ.)

The verdict of the jury for the plaintiff, taken in connection with the charge, is tantamount to a finding that the defendant is responsible for the gate being left open on the night on which the injury was done. We think that there was evidence enough to sustain that verdict. It was in proof that for nine years before the first trial of this case, which would cover the time from the fall of 1864 to that of 1873, this gate had been used in the business of loading and unloading freight in or out of the cars of the defendant, in which, to some extent, the servants of the defendant had helped. The manner of the use of it was for the cars to be run down on the rails, near to this gate, and the vehicles leaving or taking goods would pass in or out through this gateway. The result was that it was often left open at the end of the business day, and would be found open and be closed, sometimes at evening, and sometimes at midnight, by the servants of the company. The proof was uncontroverted that the plaintiff's cattle got on to the track of the defendant, through this gateway, in the night, from the gate having been left unclosed at evening. Though the evidence does not positively show that on that night it was left open by a servant, or by a customer, of the defendant, or that any goods had been received or delivered that day at cars standing near it; yet from the long continued use of it for such purpose, and from the "very considerable extent" of the business through it, and from the fact that Farrington, the adjoining proprietor,



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had not used it for six weeks before that time, and had no knowledge of the use of it that day for his purposes, the jury might well infer that it was open that evening, by reason of the use of it on that day, or some day shortly prior, by the customers of the defendant. Farrington was the only one authorized to use it, by himself or by his servants, without the permission of the defendant.

The defendant had notice that this gateway, first left for the convenience of one farmer at his farm crossing, had been diverted from the prime purpose of it, to a common passageway for its customers, because it was found to serve the daily mutual convenience of them and it. It also had notice that it was often left open in consequence thereof. It was bound to know, too, that, when opened at all, with its assent or acquiescence, it was in contravention of the statute requiring it to maintain a fence at that place, which was one of the sides of its road. If the permission to others than Farrington to open and use it, followed by actual use and opening by them, was not of itself enough to charge the defendant under the statute, it was bound to see to it, that when the use of it for the day was over, it was well closed. It might not be liable if, without its knowledge, a panel of fence was torn down, until it had a reasonable time in which to put it up again. But if, for the common purpose of itself and its customers it, from time to time, permitted that panel to be removed, and had notice from time to time that it was not restored by them when the purpose was accomplished, it would be liable for an injury to the beasts of an innocent person, straying through the gap on to its track. For the duty is to maintain its fence in good repair, which means in such state and condition that it will turn orderly cattle, or of the height and strength of a division fence required by law, and if it takes part in or permits a removal of any part of the fence, which act, from the incidents of it, results to its knowledge or notice in the fence not being kept up, it does not maintain it in that good repair. So it is with a gate at a farm crossing. It is permitted to put it there, for the convenience of the adjoining farmer, but

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as a part of its fence for all others; not for its own use, nor that of its customers. When it is put to its or their use, or made subservient to its business, it is not a farm gate *pro tanto*, but as a panel in the fence taken down by it or them, and, if left open, it is as a panel left fallen down. It is bound to keep that gate also in good repair, not simply in sound material condition, but in such state as is required for a division fence, or as will turn away cattle from its track. If it permits, invites and shares in, such a use of the gateway as, to its knowledge or notice, results in the gate not serving the end of a fence, it fails in its duty. In effect, the gate is then no longer merely a gate at a farm crossing, for the use alone of an adjoining proprietor, but it has become the fence of the defendant. When it has knowledge or notice that the gate is customarily left open, or when, from the manner of the use of it, has notice that such result is likely to happen, it is in statutory default if it does not see to the closing of it, when the use of it is over for the day or other shorter period.

The verdict of the jury was warranted by the fact and the law.

These views dispose of all the exceptions taken by the defendant at the trial. The motion for a nonsuit is shown by them to have been ill founded. The learned justice at circuit was right in holding that if the defendant had not performed the duty put upon it by the statute, a right of the plaintiff to recover arose therefrom, and that the negligence of the defendant in not keeping the gate closed at night was a failure to maintain and keep in good repair a fence at the side of its track, and not a negligence in the use of its property, such as renders it liable to one injured, by its act, in person or estate, only when he is without fault of his own.

The ruling of the learned justice on the motion for a nonsuit, that contributory negligence of the plaintiff would not preclude him from a recovery in this case, if erroneous, was corrected when he charged the jury otherwise, and left it to them to find upon that question; and it was not erroneous for him to refuse a nonsuit, putting his refusal upon that ground, if there was other good reason to deny it.

## Statement of case.

It is apparent, too, from the views above expressed, that the court was not in error in refusing the three requests to charge.

The judgment should be affirmed.

All concur; ALLEN, J., taking no part; RAPALLO, J., absent.

Judgment affirmed.

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ALVAH RISLEY v. ABNER BROWN, Impleaded, etc.

Upon the death of one of the makers of a joint promissory note, who signed simply as surety, his estate is absolutely discharged from the payment thereof, both in law and equity.

It is immaterial that the surety died after a joint judgment against him and his principal; nor is his position affected by the fact that an appeal on his part was pending at the time of his death, and that he had given an undertaking upon such appeal, providing for the payment of the judgment if affirmed.

Where, therefore, a motion was made to substitute the personal representatives of a surety, against whom and his principal a joint judgment had been obtained, as defendant in his stead, he having died after affirmance by the General Term, and during the pendency of an appeal to this court, upon which appeal an undertaking had been given staying execution, *held*, that the motion must be denied; that there could be no propriety in the substitution, as the judgment could never be enforced or properly affirmed; that the appeal could not be continued simply for the purpose of enabling the plaintiff, in case of affirmance, to bring an action upon the undertaking, as there could be no liability upon the undertaking after the judgment had been discharged, either by act of the parties or operation of law.

(Argued October 6, 1876; decided November 14, 1876.)

THE nature of the motion and the facts sufficiently appear in the opinion.

*Horatio Ballard* for the motion.

*Amasa J. Parker* opposed.

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124	218
87	160
128	207

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Opinion of the Court, per EARL, J.

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EARL, J. This is a motion for an order substituting the administrator of Abner Brown as defendant, he having died during the pendency of the appeal to this court.

The action was upon a joint promissory note made by the defendants, Abner Brown signing simply as surety. The principal interposed no defence. The action was tried before a referee, and the plaintiff recovered judgment, and judgment was entered against both defendants. Abner Brown alone appealed to the General Term of the Supreme Court, and there the judgment was affirmed. He then appealed to this court, and filed the usual undertaking providing for the payment of the judgment, if it was affirmed or the appeal dismissed. Pending the appeal, he died, and an administrator has been appointed upon his estate.

The substitution ought not to be made. It is the settled law of this State that upon the death of one of the makers of a joint promissory note, who was not liable for the debt irrespective of the joint obligation, but who signed the note simply as surety, his estate is absolutely discharged, both in law and equity (*Getty v. Binase*, 49 N. Y., 385); and it makes no difference that the surety died after a joint judgment against him and the principal. (*The United States v. Price*, 9 How. [U. S.], 83.) In the latter case, the action was upon a joint and several bond against principal and surety, and a joint judgment was recovered. The surety then died, and it was held, the obligee having treated the bond as joint by bringing an action thereon against principal and surety jointly, and the bond being merged in the judgment which was a joint obligation, that his estate was discharged, both in law and equity. It is, therefore, unquestioned that the judgment appealed from cannot be enforced against the estate of Abner Brown.

But the claim is made that the giving of the undertaking upon the appeal altered the position of the surety, and imposed upon him an independent liability to pay the judgment in case of its affirmance; but the difficulty with this claim is that the judgment can never be properly affirmed. As the

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judgment can never be enforced against the estate of the surety, there can be no propriety in substituting his administrator. As the estate is absolutely discharged from all liability upon the judgment, we should not continue the appeal simply for the purpose of enabling the plaintiff, in case of affirmance, to bring an action upon the undertaking. But it must be true that whatever discharges the estate of a surety in such a case from the judgment, also discharges it from the undertaking. There can be no liability upon the undertaking given, after the judgment has been destroyed or discharged, either by the act of the parties or the operation of law. It is quite inadmissible to construe the undertaking to mean that the surety would pay the judgment, even if he or his estate would, after the giving of the undertaking, be discharged from all liability upon the judgment.

The motion must be denied, without costs.

All concur.

Motion denied.

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BENJAMIN F. YOUNG, Administrator, etc., Respondent, v.  
CATHARINE T. HILL et al., Administratrix, etc., Appellants.

Compound interest can only be recovered upon some new and independent agreement made after simple interest has accrued, and upon sufficient consideration, or, in mercantile transactions, upon a contract implied from the course of dealing or from custom.

Where interest has already accrued, the parties may lawfully agree to turn such interest into principal so as to carry interest *in futuro*, and the forbearance will constitute a consideration; but a promise to pay interest upon interest, which is to operate retrospectively, and is supported by no consideration save a moral one resulting from the fact that the interest is in arrear and unpaid, is not valid (CHURCH, Ch. J., *FOLGER and EARL, JJ.*, dissenting).

*It seems* that it is not necessary to the validity of a promise to pay compound interest that it be in writing.

F., defendant's intestate, executed to P., plaintiff's testator, his bond, conditioned to pay \$6,768, in installments, with annual interest at six per cent. F. was the agent of P., and had in his hands this bond, with

67	162
120	26
67	162
135	606
136	480

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the other securities of his principal. F. annually computed the amount due upon the bond, compounding the interest, attaching each yearly computation to the bond, and entering it in a bond book kept by him as such agent. At the termination of F.'s agency, an account was stated between him and his principal, one item of which was the amount found due upon the bond, with interest so compounded; reckoning simple interest only, the payments made by F. upon the bond were more than sufficient to pay it in full. In an action upon the account stated, *held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that there was no promise or agreement to pay compound interest, as the statement of the account was but an admission of the correctness of the balance with interest compounded; that if a promise could be construed or implied from the account stated, there was no consideration to support the same; and that the claim could not be brought within the principle upon which compound interest is allowed upon the periodical statement of accounts between merchants.

Also *held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that the amount due upon the bond could not be recovered in an action as upon an account stated; that the action should have been brought upon the bond itself.

The complaint set forth various alleged errors and omissions in the agency account as stated. *Held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that, assuming the balance claimed to be due on the bond properly formed part of the account stated, as plaintiff sought to open and readjust the balance, the account was open to any objections on the part of the defendants.

*Young v. Hills* (6 Hun, 613) reversed.

*Stewart v. Petres* (55 N. Y., 621) distinguished.

*Mowry v. Bishop* (5 Paige, 98) limited.

(Argued June 1, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the fourth judicial department, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. (Reported below, 6 Hun, 613.)

This action was brought upon an account stated; the complaint alleged various errors and omissions in the account which it asked to have corrected.

Richard T. P. Pulteney, the original plaintiff, died during the pendency of the action, and plaintiff, his administrator, with will annexed, was substituted.

The court found the following facts, among others: The

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Statement of case.

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original plaintiff was a resident of Great Britain and was the owner of a large amount of personal property in the United States for upwards of fifty years before 1871. Joseph Fellows the intestate of the defendants, had had charge of the property of the said plaintiff in the United States as sub-agent, and for thirty-eight years before that time said Joseph Fellows had had exclusive charge of said property as agent, taking the exclusive control thereof, and received from the said plaintiff an annual salary therefor. On the 1st day of March, 1817, the said Joseph Fellows and one Andrew McNab executed to Robert Troup, who was then the agent of the plaintiff, their joint and several bond under their hands and seals, conditioned to pay to the said Robert Troup \$6,763, with interest at six per cent per annum from the 1st day of April, 1817, to be paid annually, and the principal to be paid in seven equal annual installments. During the time of his agency Fellows had charge of said bond, and held the same as part of the property in his hands as agent of said plaintiff. During all of said time, and beginning with the date of said bond and down to December 31, 1870, Fellows had computed the amount due thereon at compound interest at six per cent, with annual rests, and had attached said computation to said bond, and caused the same as aforesaid to be entered on the bond book kept by him as agent of the plaintiff, as a debt due from himself to said plaintiff. In each year of his agency Mr. Fellows reported to the plaintiff the amount of property so held by him as agent. One of the items of said report was entitled "bonds in the State of New York," and contained, among other things, the amount due on said bond above mentioned, reckoned at compound interest as aforesaid, but the amount of said bond was included with other bonds, and was not returned separately. From time to time Mr. Fellows made payments on said bond, which payments were more than sufficient to pay the same in full, if the amount due thereon were reckoned at simple interest, but if the same were reckoned at compound interest there was unpaid thereon after deducting said payments on the 8th day of December, 1871, the sum of \$39,432.73.

## Statement of case.

During all the time Mr. Fellows was such agent of the plaintiff, as aforesaid, he fully intended to pay the said bond with compound interest, and he caused said compound interest to be calculated, and charged the same against himself as hereinbefore stated, and included the same in the liquidation hereafter mentioned, with the intention and for the purpose of creating a legal obligation to pay the same. In May, 1871, Mr. Fellows ceased to act as agent of the plaintiff, and on the 8th day of December, 1871, an accounting was had between the plaintiff and Joseph Fellows, and an account was settled and stated between them. On the debit side of the account at the foot was this item, "To add amount due this day on Fellows and McNab bond \$39,432.73." A statement attached to the account signed by Fellows contained the following: "The foregoing accounts and amounts have been liquidated and settled, and the balance due to Rev Richard T. P. Pulteney is \$70,463.52, subject to the correction of any errors and omissions which may hereafter be found therein."

And as conclusion of law the court found, among other things, that the acts of said Joseph Fellows in computing compound interest on said bond, charging the same to himself on his books, reporting the same to the plaintiff as due on said bond, and including the same in the said account stated, do not create a legal obligation to pay said compound interest, and that said item of \$39,432.73 in the said account is not a charge against said Joseph Fellows and should be deducted therefrom. And after correcting various errors and deducting payments made after the statement was made, found due the plaintiff \$16,927.43, for which sum judgment was directed and perfected.

The General Term, on appeal, amended and modified the judgment by adding thereto said item of \$39,432.73, as of the date of the settlement of the account, and affirmed it as thus amended.

*A. Hadden* for the appellants. Compound interest cannot be recovered unless there is an agreement, in writing, to pay



## Statement of case.

the same after the interest upon which the agreement operates has fallen due. (*Conn v. Jackson*, 1 J. Ch., 13; *Van Benschooten v. Laroson*, 6 id., 313; *Mowrey v. Bishop*, 9 Paige, 228; *Quackenbush v. Leonard*, id., 334; *Toll v. Hiller*, 11 id., 228; *Fosman v. Fosman*, 17 How., 255; *Stewart v. Petree*, 55 N. Y., 623.) Such an agreement cannot be implied. (*Lockwood v. Thorne*, 18 N. Y., 292; *Howard v. Farley*, 3 Robt., 314; *Phillips v. Belden*, 2 Edw. Ch., 1; *Troup v. Haight*, 1 Hopk. Ch., 267, 271.)

*William Rumsey* for the respondent. An account stated is conclusive upon the parties unless the person seeking to impeach it shows fraud or mistake. (*Lockwood v. Thorne*, 11 N. Y., 170, 175; *Chubbuck v. Vernam*, 42 id., 432; *Kock v. Bonitz*, 4 Daly, 117.) There was a sufficient agreement on the part of Mr. Fellows to pay compound interest. (*Le Grange v. Hamilton*, 4 T. R., 613; 2 H. Blk., 144; *Kellogg v. Hickok*, 1 Wend., 521; *Stewart v. Petree*, 55 N. Y., 621; 3 Pars. on Con., 150, 151; *Waring v. Cunliffe*, 1 Ves., Jr., 99; *Camp v. Bates*, 11 Conn., 487, 497; *Rose v. Bridgeport*, 17 id., 243; *Mowry v. Bishop*, 5 Paige, 98; *Fobes v. Cantfield*, 13 Ohio, 18; *Bledsoe v. Nixon*, 69 N. C., 89; 12 Am. R., 642; *Hollingsworth v. Detroit*, 3 McL., 472-478; 17 Conn., 245; *Bainbridge v. Wilcocks*, 1 Bald., 536; *Watkinson v. Root*, 4 Ohio, 374; *Pierce v. Rowe*, 1 N. H., 179; *Toll v. Hiller*, 11 Paige, 228, 231, 232; *Niles v. Bd. of Comrs.*, 8 Blackf., 158, 160; *Raphael v. Boehem*, 11 Ves. Jr., 92; *Walker v. Walker*, 9 Wal., 744, 756; *Johnson v. Hedrick*, 33 Ind., 129; *Barrell v. Joy*, 16 Mass., 227; *Ossulton v. Jarmouth*, 2 Salk., 449; *Conn v. Jackson*, 1 J. Ch., 13; 3 Pars. on Con. [5th ed.], 150, 151; Story on Con., § 1033; *Barclay v. Kennedy*, 3 Wash., 350; *Rufford v. Bishop*, 5 Russ. Ch., 346, 353; *Eaton v. Bell*, 5 B. & Ald., 34; *Watkinson v. Root*, 4 Ohio, 374; *Kennon v. Dickens*, C. & N., 357; *Holmes v. De Camp*, 1 J. R., 34, 36; 2 Greenl. Ev., § 127; *Smith v. Allen*, 5 Day, 337; *Russell v. Whipple*, 2 Cow., 536; *Kimball v. Huntington*, 10 Wend., 675; *Sackett*

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v. *Spencer*, 29 Barb., 180; *Morgan v Mather*, 2 Ves., Jr., 15, 20; *Paroling v. Paroling*, 4 Yeates, 220; *Clancarty v. Latouche*, 1 B. & B., 418, 429; *Eaton v. Bell*, 7 E. C. L., 13; *Newell v. Jones*, 19 id., 304; *Ex parte Bevan*, 9 Ves. Jr., 223; *Denniston v. Imirie*, 3 Wash., 396; *Barclay v. Kennedy*, id., 350; *Howard v. Farley*, 3 Robt., 308.)

ALLEN J. Had the action been directly upon the bond, the amount legally recoverable upon which is the only item in controversy, the recovery in respect to it would have been limited to what, if anything, should be ascertained to be due thereon upon a computation after the rule prescribed in *State of Connecticut v. Jackson* (1 J. Ch. R., 13), for the computation of interest where partial payments have been made from time to time. The question is presented whether by a change in the form of action the legal rights of the parties can be varied. Compound interest can only be recovered upon some new and independent agreement, made upon a good consideration. Hence, the plaintiff brings his action as upon a stated or settled account, in which the bond is included as one of the items, with a statement of the amount due thereon in gross, but which amount is the result of compounding the interest with annual rests. The exacting or reserving of compound interest has not met with favor in the courts, but the right to retain it when voluntarily paid is not disputed, and a recovery of it upon express contract, made after the interest has accrued and upon a sufficient consideration, is allowed. When, by the terms of an obligation, interest is payable at stated periods, interest upon interest from the time it becomes due, only gives the creditor the usual and legal equivalent for the non payment of money payable at a day certain, and in some States recovery may be had of interest upon interest under such circumstances without a special contract to that effect. With us it is not allowed. Two propositions are definitely settled by adjudication: first, that an agreement to pay interest upon interest must, in order to its validity, be made after the interest which is to bear interest

has become due, and second, that it must be supported by a sufficient consideration. A mere voluntary promise, without a consideration, is a *nudum pactum* and cannot be enforced. It will be seen, I think, that in this case there was at no time a promise or agreement by the debtor to pay compound interest, and that there was no consideration to support a promise if one had been made. There are several *dicta* to be found in the reports to the effect that the agreement must be in writing. These *dicta* have their origin in *Brown v. Barkham* (1 Peere Wms., 652), which had respect to interest upon arrears of interest upon a mortgage, and Lord PARKER expressed the opinion that "to make interest on a mortgage principal, it is requisite that there should be a writing signed by the parties, forasmuch as the estate in the land is to be charged therewith." These *dicta* must be understood as applying to mortgages upon lands or other real securities, and as recognizing a difference between such securities and personal contracts. (Kelly on Usury, 47, 49; *Morgan v. Mather*, 2 Vesey, 15.)

It may be questioned whether the courts can extend the statute of frauds to cases not within its terms, and in their discretion require promises to be in writing which the legislature has not seen fit to subject to that formality.

The rule has not been applied in practice. In the large class of cases in which interest upon interest has been allowed, it has been upon an agreement implied from the course of dealing and the usage of the parties, as in the case of mutual accounts between merchants. The courts will not give effect to a stipulation for compounding future interest, not because such agreements are condemned by the usury laws, but because they may serve as a temptation to negligence on the part of the creditor and a snare to the debtor, and prove in the end oppressive, and even ruinous. (*Quackenbush v. Leonard*, 9 Paige, 334.)

It was decided in chancery, as early as 1707, that a proviso in a mortgage that future interest, if not paid, should be taken as principal and bear interest is void, and that to make

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interest principal it is requisite that it be first grown due, and then an agreement concerning it may make it principal. (*Lord Ossulston v. Lord Yarmouth*, 2 Salk., 449.) This rule has been followed by the courts of England and of this State with unvarying uniformity to the present time. (*Ex parte Bevan*, 9 Vesey, 228; *Mowry v. Bishop*, 5 Paige, 98; Comyn on Usury, 146; *Van Benschoten v. Lawson*, 6 J. Ch., 313; *Connecticut v. Jackson*, *supra*; *Eaton v. Bell*, 5 B. & Ald., 34; *Toll v. Hiller*, 11 Paige, 228; *Forman v. Forman*, 17 How., 255.) It is held in *Van Benschoten v. Lawson* (*supra*), that the security which was for interest upon interest computed from a time past, and thus retrospective in its operation, was void, and that a valid agreement could only be made which should be prospective in its operation. The security for the compound interest which had already accrued was by mortgage upon real property, and upon bill filed to foreclose it the mortgage was held not to be usurious, but the amount included for interest upon interest was disallowed, as not recoverable in equity. Lord ELDON, in *Ex parte Bevan* (*supra*), seemed to be of the opinion that although agreements for interest upon interest were legal between merchants, the rule could not be applied to a real security.

Chancellor KENT did not rest his decision of the *Van Benschoten* case upon any distinction between real and personal securities, but upon the fact that the obligation was retrospective in its operation and that such an agreement could not be recognized or enforced in a court of equity. No reference is made to any consideration or to the want of a consideration for the obligation. The case is clearly an authority to the extent that an agreement not made upon some new and sufficient consideration for the payment of interest upon interest for a time already past, will not be sustained or enforced in equity. The decision goes further than this, but this is as far as it is necessary to rely upon it as an authority here. This case was commented upon by Chancellor WALWORTH in *Mowry v. Bishop* (*supra*), but the criticism was *obiter*, as the question was not involved in the case then under consider-

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ation. In *Stewart v. Petree* (55 N. Y., 621) the only defence interposed was that of usury, and the decision might have been placed upon the authority of *Kellogg v. Hickok* (1 Wend., 521) and *Le Grange v. Hamilton* (4 T. R., 613), and other cases in which the precise point had been adjudged.

The decision actually made by the court was upon the defence of usury, and the authority of the *Van Benschoten* case is not impaired by it. An obligation to pay compound interest already accrued would be without consideration, as the mere moral obligation to compensate the creditor for the loss of his interest would not be sufficient to support the undertaking. (*Ehle v. Judson*, 24 Wend., 96.) Whether in *Stewart v. Petree* the extension of the time for the payment of the principal, as well as the accrued interest, was a sufficient consideration for the note was not considered, as the question was not made by the defendant. It was claimed to be illegal, and that, therefore, the note was usurious. At the time of the rendition of the account by the debtor in this case the creditor had no legal or equitable claim to the compound interest or to interest upon interest, and had its payment been coerced and an unfair advantage taken of his necessities to compel the payment of it, or security for its payment, the transaction would have been avoided by a court of equity as unjust and oppressive, and restitution ordered. (*Thornhill v. Evans*, 2 Atk., 330.) While all the cases agree that when the interest has once accrued the parties may lawfully agree to turn such interest into principal, so as to carry interest *in futuro*, and the forbearance will constitute a consideration, there is no case that has come under my observation that holds that a like promise to operate retrospectively is valid, unsupported by any consideration other than the moral consideration (if one exists) resulting from the fact that the interest is in arrear and unpaid.

Had the debtor at the time of the statement of the account, upon which reliance is placed, expressly promised to pay the interest in arrear with interest upon it from the time it was due and to compound it, the promise would have been a nude

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Opinion of the Court, per ALLEN, J.

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pact without consideration. The plaintiff is in no better situation seeking to recover upon a bare acknowledgment of an indebtedness from which an implied promise is claimed than he would have been upon an express promise.

Engagements to pay interest in future upon interest already accrued have a consideration in forbearing and giving day of payment for moneys presently due. It is the agreement to forbear for a time in the future that gives vitality to the promise. (*Eaton v. Bell*, *supra*.) There can be no valid contract without a consideration to support it, and the right to compound interest depends entirely upon contract expressed, or, in mercantile transactions, implied from the mode of dealing with former accounts or from custom. (*Fergusson v. Fyffe*, 8 Cl. & Fin. R., 121; *Ex parte Bevan*, *supra*.) Lord HARDWICK, in *Thornhill v. Evans*, which was an extreme case, intimated that an agreement to turn interest into principal could only be upon the advance of fresh money, and that even then it was reckoned a hardship. But it is not apparent why any other consideration, sufficient in the law to support a contract, would not serve as a consideration for this particular agreement as well as the actual advance of other money.

Compound interest is recoverable upon merchants' accounts of mutual dealings, upon an express agreement, or when an agreement may be implied from custom or usage, for the reason that an extension of time for payment is implied, and the transaction is fair, as the balance may change and the benefit of the usage be mutual. (*Kelly on Usury*, 49.) The promise relied upon by the plaintiff is merely implied from the acknowledgment in the statement of account in December, 1871. It has no foundation in any usage or prior dealing between the parties. For this promise (if one can be implied) there is no consideration. Delay in payment was neither asked or granted, and if this action can be maintained, a like action might have been brought immediately. Neither was any money advanced or other right relinquished by the creditor or benefit conferred upon the debtor. It was at best a gratuitous promise to pay a very large sum of money, to which

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the promisee had no claim, either at law or in equity, and an action will not lie upon it. But the rendition and statement of the account was not a promise or the equivalent of a promise to pay the compound interest upon which an action will lie. It was merely an acknowledgment that, upon the basis of the computation made, the sum named was due for principal and interest. Upon a like statement of account, and of a balance due between merchants, the law implies a promise, for the reason that the several items, when established, constitute legal demands of the respective parties against each other, upon which an action would lie, and the acknowledgment is an admission of the correctness of the items of debit and credit, resulting in the stated balance. The right of action as upon a promise to pay necessarily follows. In such case there is no estoppel. The account may be impeached for errors or mistakes. It merely establishes, *prima facie*, the accuracy of the items without further proof. (*Lockwood v. Thorne*, 18 N. Y., 285.) If it appears that any of the charges are not, in law or in equity, proper claims against the party debited with them, no promise to pay will be implied in respect to the balance into which they enter, and of which they are a part. The law will not imply a promise to pay compound interest, except under peculiar circumstances, and upon some evidence from which an agreement to turn the interest into principal to bear interest for the future can be inferred. *Thompson v. Leith* (4 Jur. [N. S.], 1091) was a much stronger case for the plaintiff than this, and one in which it was very evident that the payment of interest was deferred by the creditor upon the faith that interest would be paid thereon. A promise would have been implied from the same circumstances to pay any claim that the law regarded as either legal or equitable. A correspondence took place between the mortgagee and mortgagor, extending over a series of years in which the mortgagee stated his intention, if the interest on the mortgage was not paid, to add it to the principal and to charge the same interest upon the amount as the mortgage bore. The mortgagor replied from

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time to time, that he could not pay the interest and that it must be added to the claim of the mortgagee.

It was held that it did not amount to an agreement to pay compound interest, and the claim of the mortgagee was not allowed. In *Brown v. Barkham* (*supra*), there being a great arrear of interest, the mortgagee sent an account in writing of the sum due him for interest, computing it at six per cent, and the mortgagor returned answer, allowing the account, desiring forbearance and promising to make satisfaction to the mortgagee for the same, Lord PARKER held that there was no agreement to make the interest, principal so as to bear interest. The statement of the account is a waiver of other proof of the same facts and results. Upon proof in any other manner of the correctness of the items of debit and credit which enter into an account stated an action for the resulting balance would lie and the law would imply a promise to pay it as it would upon a formal striking of the balance by the parties. Here the statement of the account is but an admission of the gross amount due upon the bond resulting from a computation of interest with annual rests.

This admission has no other or different effect than would be given to proof of the same fact by any other competent evidence, or by a computation in the presence of the court, and the legal and equitable rights or obligations of the parties are not affected.

The law, while it permits the party to become bound to pay interest, will not imply or impose an obligation to pay in the absence of a promise and without any consideration for a promise. The statement of the account does not give the plaintiffs an action for the recovery of compound interest. The statement of the account is not the equivalent of an express promise to pay the balance when the items do not constitute a legal debt or duty.

The law implies a promise when justice and reason require, in order to give effect to transactions. But an express promise to pay the exorbitant amount included for compound interest



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here, would neither be just or reasonable. An agreement to pay simple interest upon the several instalments of interest as they became due and a computation based upon such agreement, applying the payments as made first to the payment of interest until all was paid, might not be unreasonable or inequitable.

The result would have been far different from that now insisted on. Again, there being an express contract for the payment of the debt and the interest undischarged, the law will not imply another and different agreement for the same purpose. *Expresum facit cessare tacitum*. This is not a separate and independent undertaking for the payment of the extraordinary interest, but if one was made, it was for the payment of the whole debt.

And just here, the plaintiff has to encounter and overcome another obstacle to the recovery, as upon an account stated, the amount secured by the bond. When a sum of money is secured by a deed and a balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the account, and promises to pay it, an action will not lie on this account and promise, but the action must be brought on the security. A simple contract is merged in a bond, covenant or other contract by deed or record, but the greater security is not merged in a lesser. (*Middleditch v. Ellis*, 2 Exch., 623; *Wood v. Edwards*, 19 J. R., 205; *Landis v. Uric*, 10 S. & R., 316; *Gilson v. Stewart*, 7 Watts, 100.) A debt of record or by deed may be turned into a simple contract debt, but only upon some new consideration, and then the action must be upon the special agreement, and not upon an *insimul computassent*. (*Miller v. Watson*, 4 Wend., 267; S. C., 7 Cow., 39.)

A new promise of indulgence, and to forbear payment, would not, it seems, be regarded a sufficient consideration to support an action of assumpsit. (Per KENNEDY, J., *Gilson v. Stewart*, *supra*.) But a promise will not be necessarily, and in all cases, implied from a mere assent or acknowledgment when an express promise would give a cause of action.

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(*Compton v. Jones*, 4 Cow., 13; *Jessel v. Williamsburg Ins. Co.*, 3 Hill, 88.)

Perhaps, if a debt, although secured by deed, is made up of many items, and in the statement of an account the items are mingled with other and distinct items of indebtedness, and a balance struck, the including of the latter class of items may be a sufficient consideration to support an express promise to pay the general balance. (*Gilson v. Stewart*, *supra*.) But here the bond was conditioned for the payment of a single sum of money by installments, and is only made a part of the account by being added to the debit side as a sum in gross due on the bond after the making up of the account of the general dealings of the parties, which properly enter into an account current. Again, the bond debt was not the sole debt of the defendant's testator, and was entirely disconnected with the fiduciary transactions which entered into and constituted the entire account of mutual dealings between the parties.

This case is not within any of the recognized exceptions to the rule that a bond debt will not be merged in a simple contract so as to permit an action upon the latter. The plaintiff should have counted on the bond; but assuming that the balance claimed as due upon the bond properly formed a part of the account stated and settled, and may be recovered as a part of the general balance in an action of *insimul computascent*, the plaintiff has other difficulties to overcome. This is an action for equitable relief, and the plaintiff seeking equity must do equity. The action seeks to open the account and readjust the balance, and the account is open to any objections by the defendant. If he can show any mistake, fraud or error, or that any item is improperly in the account, leading to a result and a balance which courts of equity regard as iniquitous and oppressive, he may insist in this action upon his equitable rights, and that the account be adjusted upon an equitable and just basis. The account was, to all intents and for all purposes, as to all matters properly included in it, a stated account, and could only be opened upon allegations of specific errors. A settled account is *prima facie* evidence,

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and will be deemed conclusive between the parties, unless some fraud, mistake, omission or inaccuracy is shown. An exception is recognized when the parties are not upon equal terms and then a court of equity may wholly disregard it. An account will not, in the absence of fraud, be opened ordinarily upon a general charge of inaccuracy, but the specific errors must be alleged. (Story Eq. Jur., §§ 523, 527; *Consequa v. Fanning*, 3 J. Ch., 587.) The plaintiff has assigned errors on both the credit and debit side of the agency account, affecting materially the balance upon that account between the parties, but not affecting the amount stated as due in the bond. It was open to the defendant to falsify the account by showing that a wrong charge was included in it. In *Troop v. Haight* (Hopk. R., 272), the right to falsify the account was, to some extent, restricted by the special agreement of the parties, but the general rule was recognized by the chancellor. (See also *Philips v. Belden*, 2 Edw. Ch., 1; *Champion v. Joslyn*, 44 N. Y., 653; *Taylor v. Haylin*, 2 Br. Ch. C., 310.) The stipulation that the settlement of the accounts was "subject to the correction of errors and omissions which may be hereafter found therein" does not render it any the less a settled account, and subject to all the rules applicable to stated accounts. This is implied in every stated account, and in every settlement of commercial transactions. This was expressly decided in *Johnson v. Curtis* (3 Br. Ch. C., 266; cited also in 2 id., 310), in which there was a similar stipulation. The form of action was properly adapted to correct the account in the respects to which specific objections were taken, and the court had jurisdiction to reopen and readjust the accounts upon the allegations of the complaint. But this does not enable the plaintiff to insist upon a claim or judgment for the payment of the compound interest which, under the circumstances, and within the rulings and intimations of all courts and judges who have spoken on the subject, must be regarded as oppressive and unjust, and, therefore, not to be allowed in equity. The plaintiff's claim is inequitable, not to be enforced in equity, and, as a claim at law, has no

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foundation. The claim cannot be brought within the principle upon which compound interest has been allowed upon the periodical statement of accounts between merchants in which interest has been charged in and treated as principal. These cases proceed upon the theory that the circumstances authorized an inference of an agreement at the end of every year that the interest then due should become principal. (*Lord Clancarty v. Postwick*, 1 Ball & B., 429.)

The judgment of the General Term should be reversed, and that of the Special Term affirmed.

CHURCH, Ch. J. (dissenting). This action is brought to recover the balance of an account stated and settled between the parties on the 8th day of December, 1871, and the controversy arises upon a single item in the account as follows: "To add amount this day due on Fellows and McNab bond \$39,432.73." The defendants' intestate had been for more than fifty years previously the agent and sub-agent for the plaintiff's intestate, a resident of England, in the management of a large real and personal estate in this and other States, commonly known as the Pulteney estate, and the bond in question was executed by the defendants' intestate, Mr. Fellows and one McNab, in 1817 for \$6,763, with annual interest at six per cent in seven annual instalments, and was held by Mr. Fellows as a part of the property of his principal. There had been paid prior to the settlement of the account upon the said bond about \$34,000, which was sufficient to discharge the bond at simple interest, and the question is whether the plaintiff is entitled to recover the sum above specified, it being the accumulation produced by compounding the interest. It is well settled in this State that compound interest is not allowable unless there is an agreement in writing to pay it after the interest has accrued, and that an agreement to pay interest upon interest not accrued will not be enforced. These principles are founded upon a wise public policy for the protection of the weak and ignorant debtor against extortion and oppression by the grasping creditor who, by an apparent indulgence,

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is enabled to delude his victim into certain ruin. (1 J. Ch., 13, per KENT, Ch.) If, however, the debtor, after interest has accrued, voluntarily, without coercion or menace, agrees in writing that such interest shall be regarded as principal, which is equivalent, in legal effect, to an agreement that he will pay interest on such accrued interest, the agreement will be enforced. Whether such an agreement, which is retrospective in its terms, is valid has been a disputed point in this State. In *Van Benschooten v. Lawson* (13 J. Ch., 313) Chancellor KENT decided that such an agreement was invalid, while in *Mowry v. Bishop* (5 Paige, 98) Chancellor WALWORTH, although ostensibly distinguishing the two cases, substantially held and argued that such a contract was valid, and that the moral and equitable obligation to pay the interest when due furnished a sufficient consideration to support the promise. As an original question, after a careful examination of the grounds upon which the rule of public policy was founded, in connection with the authorities, I should hesitate in adopting the views of Chancellor WALWORTH, in 5 Paige (*supra*). Those of Chancellor KENT, in 6 Johnson's Chancery Reports (*supra*), seem more in consonance with the general principle involved. But the recent case in this court, of *Stewart v. Petree* (55 N. Y., 621), must be regarded as foreclosing the question, and establishing the validity of such a contract. Although the question presented was usury, yet as the note was wholly for compound interest, theretofore accrued, its validity upon the ground of public policy was necessarily involved, and must have been so regarded by the court, as the opinion is expressly adverse to the decision in 6 Johnson's Chancery (*supra*), and there are other cases cited tending in the same direction. Under these circumstances it is not desirable or proper to reopen the question, and the decision, it must be confessed, is in accordance with considerable judicial expression. The important question is, whether there was such an agreement as the law requires to render the defendant liable. The agreement is predicated upon the fact that Mr. Fellows was in the habit of compounding the interest every year upon this bond in his books, and in his state-

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ments to his principal of including the amount with the compound interest in the gross amount of bonds, and upon the account stated and settled in 1871, at the close of his agency. Attached to this account is a writing signed by Mr. Fellows, the first paragraph of which is as follows: "The foregoing accounts and amounts have been liquidated and settled, and the balance due to Rev. Richard T. B. Pulteney is \$70,463.52, subject to the correction of any errors and omissions which may hereafter be found therein."

The learned judge who tried the case found that Mr. Fellows caused the compound interest to be calculated and charged against himself, and included the same in the account of 1871, "with the intention and for the purpose of creating a legal obligation to pay the same." The question is whether he did create such legal obligation within the established rules of law. It is quite clear, I think, that the exception in the certificate of errors and omissions hereafter found cannot be held to include this item. Such errors and omissions were intended to apply to those arising from mistake or misapprehension as to some fact. The undisputed evidence and finding is, that there was no mistake of fact in this item, and that Mr. Fellows intended to pay compound interest upon the amount secured by this bond, and inserted the item in the account for that purpose. It was not, therefore, an error or omission within the meaning of the language of the exception. The respective counsel argued elaborately as to the character of the agreement required to create a liability to pay compound interest, on the part of the defendant, that it must be an express agreement, and on the part of the plaintiff that an implied agreement would suffice. We must not be misled by the use of particular words. As a result of the authorities, I apprehend that it is sufficient if the agreement is such that its legal effect is to pay interest upon interest, and this may not depend upon the use of those precise words. An agreement in terms that accrued interest might be regarded as principal would be, in legal effect, an agreement to pay interest upon interest, although that language was not expressed, because

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when it becomes principal it draws interest as other principal money. It then becomes transformed from a debt for interest to a debt for principal, and has the same quality in respect to earning interest as other principal moneys. Such an agreement is in substance an express agreement to pay interest. On the other hand, an acknowledgment that a given sum of money is due as interest is not sufficient to change it into principal upon which interest might be calculated. Such an acknowledgment would not constitute an implied agreement even to that effect, for the reason that the acknowledgment would not be inconsistent with its remaining as interest simply.

In this case Mr. Fellows certified that upwards of \$39,000 was due on this bond, and he arrived at this result by adopting the detailed account kept by himself or under his direction, in which interest upon interest was calculated. In substance, he agreed that there was that sum due which was impossible, except upon the theory of compound interest, and did not this agreement in legal effect necessarily embrace an agreement to pay compound interest. If so, it is immaterial what name is attached to it, whether express or implied. What is necessarily implied in an agreement is deemed in law expressed. By his own act he turned the yearly interest into principal, and he agreed that the result was correct. I feel constrained to hold that this, in legal import, constituted a special agreement that the yearly interest should be regarded as principal. To illustrate: A debtor owing an outstanding bond of \$1,000, payable in one year with interest, presents to his creditor at the end of the year a statement showing that \$1,000 is due for principal and seventy dollars for interest, and signs the statement agreeing that there is that amount due. Such an agreement would not change the interest to principal, because, as before stated, it is equally consistent with its remaining a debt for interest. If a clause was added that the interest due might be regarded as principal, the right to calculate interest upon it from that time would be clear. If the same debtor, at the end of two years, presented an account,

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with the interest for one year added to the principal, making \$1,070, and the interest calculated upon that sum the second year, making seventy-four dollars and ninety cents, and certified in writing to its correctness as the amount due, the proper and legal construction of such a transaction would be an agreement that, at the end of the first year, the interest should be turned into principal, and that is precisely this case. The detailed statement must be considered in connection with the settled account, as the result of the statement was adopted in the account, and the agreement to its correctness embraces, necessarily, an agreement to transform the interest annually into principal.

Regarding the case of *Stewart v. Petree* (*supra*), as definitely settling the rule that an agreement to pay compound interest may be retrospective, the conclusion follows from the foregoing views that the written agreement in this case was sufficient for that purpose. There is no claim in the case, that there was any attempted extortion, or any threat or menace, express or implied, on the part of the creditor. It is undisputed that what was done was done voluntarily and freely, and in pursuance of what the debtor regarded as a duty. It is found that he intended to create a legal obligation to pay compound interest, and I think he succeeded. The suggestion was made on the argument that interest should not be added to the amount admitted due, and that the agreement, if sufficient to cover compound interest previously accrued, would not justify interest upon such interest after that time. The answer to this is that the agreement, if effectual and valid, changed the debt from interest to principal (except the last year's interest), and when changed it became for all purposes a part of the principal.

The judgment of the general term must be affirmed.

For reversal of judgment of General Term, and affirmance of that of Special Term: ALLEN, RAPALLO, ANDREWS and MILLER, JJ.

CHURCH, Ch. J., FOLGER and EARL, JJ., dissent.

Judgment reversed.



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Statement of case.

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DANIEL S. READ et al., Respondents, v. NICHOLAS H. DECKER,  
Appellant.

Defendant contracted to do the work and furnish materials in constructing tracks for the N. Y. C. and H. R. R. Co. The contract provided "that all stone taken from excavations which may, in the opinion of the engineer be suitable for masonry shall be deposited in some convenient place \* \* \* to be designated by him, and shall be the property of the company." Plaintiff entered into a sub-contract with defendant for a portion of the work. In an action to recover a balance alleged to be due thereon, defendant offered to prove that plaintiff took from excavations and used 1,149 yards of stone, and that in defendant's final settlement with the company he was charged with the value thereof \$1,546.80. This was objected to and excluded, *held*, no error; that the provision contemplated that the engineer should point out such stone as he deemed fit for masonry and designate the place to which he desired it removed; that plaintiff was entitled to use stone as to which no such designation was made, and as defendant did not offer to prove that plaintiff used stone so pointed out, the first part of the offer was insufficient and so properly rejected; and that the fact that a charge was made by the company against defendant for the stone, was not competent proof of his liability for it.

(Argued June 8, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiffs entered upon the report of a referee. (Mem. of decision below, 6 Hun, 646.)

This action was brought to recover a balance alleged to be due upon a contract.

The defendant had a contract with the New York Central and Hudson River Railroad Company to do the work and furnish certain material for additional tracks from Schenectady to Fort Plain.

The defendant sublet to the plaintiff certain sections on that contract.

The specifications are the same in the contract and in the subcontract. One clause in such specification is as follows: "All stone obtained from excavations which may, in the

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opinion of the engineer, be suitable for masonry, shall be deposited in some convenient place within 800 feet haul, to be designated by him, and shall be the property of the company."

The defendant on the trial offered to show that the plaintiffs, in performing their aforesaid contract, took from the excavation 1,149 yards of stone, and used the same in constructing vertical wall and the like; that the value thereof was \$1,546.80, and that the defendant in his final estimate under his said contract with the company was charged that amount. This was objected to as not covered by the answer, as immaterial, and that plaintiff had the right to use stone not designated by the engineer as suitable for masonry. The objections were sustained and defendant's counsel duly excepted.

*Samuel Hand* for the appellant. Defendant's claim was not a counter-claim, and could not be pleaded as such. (Code, § 150; *Davidson v. Remington*, 12 How., 310; *Vassar v. Livingston*, 3 Kern., 248.)

*D. S. Morrell* for the respondents.

RAPALLO, J. Independently of the question of the admissibility of the evidence offered, under the answer, we are of opinion that it was properly rejected on the merits.

The clause of the contract upon which the offer was based was as follows: "All stone obtained from excavations which may, in the opinion of the engineer, be suitable for masonry, shall be deposited in some convenient place, within eight hundred feet haul, to be designated by him, and shall be the property of the company."

This provision necessarily contemplated that during the progress of the work the engineer should point out such stone as he deemed suitable for masonry, and should designate the place to which he might desire it to be removed. The parties must have intended that the opinion of the engineer should

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be expressed. Until this was done the contractor could not know whether or not the company intended to claim the stone. If no such claim was made he was at liberty to use the stone in the performance of the work. It was necessary that some disposition be made of the stone at the time, as the excavation could not proceed without removing it, and if not claimed by the company the contractor had the right to assume either that they did not deem it suitable for masonry or that they waived the right reserved by the contract.

The offer which was rejected was not to prove that any stone was used by the plaintiffs which the engineer had claimed under the clause in question, or which was, in his opinion, suitable for masonry, but simply that the plaintiffs had used in the work stone taken from the excavation. There was nothing in the contract which precluded the plaintiffs from using such stone, if not claimed by the engineer and directed by him to be deposited. That branch of the offer was consequently insufficient and was properly rejected.

The second branch of the offer was clearly objectionable. The fact that in the final estimate a charge for stone taken from the excavation had been made by the company against the defendant was not competent proof of liability for such stone. For all that appears in the case the charge was not a proper one.

The rejection of this offer being the only subject of exception, the judgment should be affirmed.

All concur.

Judgment affirmed.

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WILLIAM F. EDINGTON, Respondent, v. THE MUTUAL LIFE  
INSURANCE COMPANY OF NEW YORK, Appellant.

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Where, in a policy of life insurance, it is stated that the insurance is made in consideration of the representations in the application, but the application is not made a part of the policy, or, in any other manner, referred to therein, it is not error to admit the policy in evidence, on the part of the plaintiff, in an action brought upon it, without production of the application. If any question is raised by defendant thereon, it more properly belongs to it to introduce the application in evidence.

An error in admitting a policy in evidence without the application, is cured by the introduction of the application in evidence by the defendant.

Declarations and admissions of the assured as to his condition of health, made at a time prior to and remote from the application, and not in connection with some act or fact showing his state of health, are not competent, in an action by an assignee upon the policy, for the purpose of disputing representations in the application.

*Swift v. Massachusetts Mutual Life Insurance Company* (63 N. Y., 186) distinguished.

The provision of the Revised Statutes (2 R. S., 406, § 73) prohibiting a physician from disclosing any information received by him necessary to enable him to prescribe for a patient includes not only information from statements of the patient, but such knowledge as the physician may acquire from the patient, from statements of others present at the time, or from his own observation of the patient's symptoms and appearance. It will be presumed, from the relationship of the parties that information so imparted was given or obtained for the purpose of enabling the physician to prescribe for the patient, and so, that it was material.

Accordingly, *held*, in an action upon a policy of life insurance, that an offer, upon the part of defendant, to prove by a physician, who had been consulted professionally by the assured, that prior to the application he was afflicted with certain diseases for which the witness treated him, was properly excluded, although the testimony was expressly limited to what the witness knew, independent of any information given or statements made by the assured.

*Hewitt v. Prince* (21 Wend., 79) distinguished.

The right of objecting to the disclosure of such privileged communications is not limited to the patient and his personal representations, but an assignee may exercise it, and his right is not affected by the decease of the patient.

The statutory prohibition above referred to is not repealed by the section  
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of the Code (§ 390) authorizing the examination of an adverse party as a witness.

An application for insurance contained these questions. "How long since you were attended by any physician? For what diseases? Give name and residence of your usual medical attendant? The assured answered: "Have none; only consulted Dr. C. H. Carpenter now and then for slight ailments and taken his prescriptions." In an action upon the policy it appeared that several other physicians had treated and prescribed for him. *Held*, that the question whether the assured could be charged with an omission to give such information as the questions were intended to elicit, was one of fact for the jury, and that a refusal to allow defendant to go to the jury was error.

*Edington v. Mutual Life Insurance Company* (5 Hun, 1) reversed on the point last above stated.

(Argued September 18, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term in the fourth judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment on verdict. (Reported below, 5 Hun, 1.)

This action was brought to recover the amount of four policies of insurance issued by the defendant upon the life of William F. Diefendorf for his benefit, and by him assigned to the plaintiff.

The policies were issued in 1867; the first one in July, 1867. The assured died on the 21st day of March, 1871. All of said policies were issued upon the application of Diefendorf, and each contained the following stipulation and agreement: "If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then, and in every such case, this policy shall be null and void."

It was stated in each policy that it was issued in consideration of the representations made to the defendant and of the annual premium. Each application contained a declaration, that it was thereby mutually agreed, by and between the assured and the company, that the particulars contained therein, being the answers of the assured to the questions pro-

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posed, "formed a part of the contract with the company;" that the said application and the declaration thereto attached should form the basis of the contract between the assured and the said company; that the answers to all of the questions propounded to the friend and physician designated by him were true and correct, and that no intentional omission, concealment or mental reservation had been made of any material facts or circumstances relating to the past or present health, habits or condition of the assured. And each of said applications contained an agreement "that if any misrepresentations or fraudulent and untrue answers had been made, or if any facts which should have been stated to the defendants have been suppressed therein \* \* \* that then and in either event the said policy shall become and be null and void."

In the first application Diefendorf was asked "have you ever had any of the following diseases; if so, state which, how recently, and the full particulars: \* \* \* Rheumatism, and of what nature; disease of the heart, disease of the urinary organs, or of any other vital part?" His answer was that he had an attack of rheumatism several years ago, about ten years. He was also asked if he ever had any local disease, to which he answered "no;" if his urinary organs were in a healthy state, to which he answered "yes;" and the physician referred to in this application, in answer to the question "are his urinary organs in a healthy condition," answered "yes;" and in answer to the question whether he ever had any disease of those organs, he answered "no."

In the second and third application: Being asked if he ever had any of the following diseases; if so, state which, how recently, and the full particulars, viz: Rheumatism, and of what nature; disease of the urinary organs, or of any other vital part, he answered, in the second "no, except inflammatory rheumatism, about ten years ago, nothing before or since," and in the third "no, except two attacks of inflammatory rheumatism, the last one about ten years ago, of no account in result." He was also asked if he had ever had any local disease; if so, of what nature? He answered: in second

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"no," and in third "no, except as above stated." He was also asked in both if his urinary organs were in a healthy state, to which he answered "yes;" and the physician referred to by him in both applications, in answer to the question whether his urinary organs were in a healthy condition, answered "yes;" and in answer to the question "had he ever had any disease of those organs," he answered "no." In each of said applications the assured was asked "how long since you were attended by a physician, and for what disease; give name and residence of such physician, and the name and residence of your usual medical attendant." To this question, in the first application, he answered "Dr. Carpenter has known me two years," and he represented that Dr. Carpenter was his physician, and the same representation is contained in the other two applications. In the second application he answers this question in the same way, and in the third application he answers as follows: "Have none; only consulted Dr. C. H. Carpenter now and then for slight ailments, and taken his prescriptions; Dr. C. H. Carpenter, Geneva, has known me three years."

Defendant, among other defences, set up breaches of warranty and fraudulent misrepresentation and concealment. Upon the trial plaintiff offered the policies in evidence; they were objected to by defendant's counsel upon the ground that the applications were part and parcel thereof, and should be offered in evidence in connection with them. The objection was overruled and defendant's counsel duly excepted. The applications were subsequently offered and received in evidence on the part of defendant. Defendant offered in evidence, for the purpose of contradicting the statements in the applications, an application for insurance made by Diefendorf to the *Ætna* Life Insurance Company, May 17, 1867; this was objected to as incompetent against an assignor, and objection sustained. Defendant also offered for the same purpose proof of declarations and admissions made by Diefendorf some time prior to the applications in question, as to his health and the diseases with which he was affected. These were objected to, excluded, and exception duly taken.

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Defendant called several physicians as witnesses who had been consulted professionally by Diefendorf, and who had prescribed for him (one of them was Dr. Carpenter, the physician referred to by Diefendorf in the applications), and offered to prove by them that Diefendorf had for several years prior to the application been afflicted to a very serious degree with chronic diarrhoea, disease of the urinary organs and inflammatory rheumatism, and that these diseases increased upon him to his death; "that the knowledge which they obtained upon the subject was obtained solely from their attendance upon him as physicians, and not from any information received from him." The plaintiff's counsel objected to the offer, on the ground that the same was privileged from disclosure under the statute. The court sustained the objection, and the defendant's counsel duly excepted.

It appeared that several other physicians besides Dr. Carpenter had been consulted by Diefendorf, had treated and prescribed for him.

Defendant's counsel, among other things, asked to go to the jury upon the question, whether the statements of the assured in his applications as to his physician were true or not. The request was denied, and said counsel duly excepted.

The court directed a judgment for plaintiff for the amount of the policies. Exceptions were directed to be heard at first instance at Special Term.

*Henry E. Davies* for the appellant. It was error to allow plaintiff to give in evidence the policies without the applications upon which they were based. (*Larne v. Rowland*, 7 Barb., 112; *Rawls v. Am. L. Ins. Co.*, 36 id., 365; 27 N. Y., 293; *Murdock v. Chenango Mut. Ins. Co.*, 2 id., 210; Bliss on Life Ins. [2d ed.], 91; *Lycoming F. Ins. Co. v. Sailer*, 67 Penn., 108; *Dullard v. Am. Pop. L. Ins. Co.*, Sup. Ct., Buffalo.) It was competent to contradict, by statements in an application by the insured to another company, those in the applications to defendant. (*Crary v. Sprague*, 12 Wend., 41; 1 Phil. Ev., 202; 1 Starkie, 39, 47; *Bullis v. Montgomery*, 3



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Lans., 260; *Kelsey v. Un. L. Ins. Co.*, 1 Big., 76; 35 Conn., 225; *Aveson v. Ld. Kinnaird*, 6 East, 188; *Smith v. Aetna Ins. Co.*, 49 N. Y., 215; *Yale v. Trav. Ac. Ins. Co.*, 2 T. & C., 221.) The court erred in excluding the question put to Dr. Eastman as to what disease he treated the insured for. (2 R. S. [Edm. ed.], 422; *People v. Gates*, 13 Wend., 324; *Kendall v. Gray*, 2 Hilt., 300; *Duchess of Kingston's Case*, 11 How. S. T., 243; 12 id., 643; 1 Green, § 248; *Hewitt v. Prime*, 21 Wend., 79; *Johnson v. Johnson*, 14 id., 63; 1 Phil. Ev., 108; 1 Starkie, 104; *Crittenden v. Strother*, 2 Cr. C. C. R., 464; *People v. Sheriff of N. Y.*, 29 Barb., 622; *Allen v. Public Admr.*, 1 Brad., 224.) The privilege of preventing the disclosure of a professional communication being personal, the death of the insured prevents its being asserted. (1 Brad., 221; 1 Abb Dig., 22; 14 Wend., 637; 1 Greenl. on Ev., note, 281; Bliss on L. Ins. [2d ed.], 648; *Dilleber v. H. L. Ins. Co.*, Ins. L. J., Aug., 1874, 638.) The question would have been competent if the insured had been alive, and no privilege can now be interposed to prevent it. (*Whitney v. Barney*, 30 N. Y., 342; *Mitchell's Case*, 12 Abb. Pr., 249; Phil. on Ev. [ed. 1867], 129; *Coutail v. Thomas*, 9 B. & C., 288; *In re Bellis*, 38 How. Pr., 79.)

*Geo. F. Danforth* for the respondent. The introduction in evidence of the applications by defendant cured any error there might have been in plaintiff's failure to introduce them. (*Rich v. Rich*, 16 Wend., 666.) The declarations of the insured were properly excluded. (*Paige v. Cagwin*, 7 Hill, 361; *Booth v. Sweezey*, 8 N. Y., 276; *Tousley v. Barry*, 16 id., 497; *Lincoln v. Lincoln*, 12 Gray, 48; *Atkins v. Elwell*, 45 N. Y., 757; *Webb v. Odell*, 49 id., 583; *Height v. People*, 50 id., 392; *McKeon v. Lee*, 51 id., 305; *Coleman v. People*, 55 id., 85; *Cuyler v. McCartney*, 40 id., 226; *State of Iowa v. Ross*, 21 Iowa, 469; *Adsit v. Wilson*, 7 How. Pr., 71; *Van Buren v. Wells*, 19 Wend., 203; *Brown v. Lusk*, 4 Yerg., 215; *Enos v. Tuttle*, 3 Conn., 250; *Aveson v. Kinnard*, 6 East, 188; *Bacon v. Inhabs. of Charlton*, 7 Cush., 586; *Ins.*

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Opinion of the Court, per MILLER, J.

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*Co. v. Mosley*, 8 Wal., 397; 56 N. Y., 102; *Ashland v. Marlborough*, 99 Mass., 47; *Estes v. World Mut. L. Ins. Co.*, 6 Hun, 352; 2 Phil. on Ev. [Ed. ed.], 208; 1 Greenl., §§ 109-111; *Nutting v. Paige*, 4 Gray, 584; *Bullis v. Montgomery*, 50 N. Y., 358; *Tilson v. Terwilliger*, 56 id., 277; *Sugden v. Ld. St. Leonard*, L. R., 1 Prob. Div., 240; 1 Stark. on Ev., 52-54.) The evidence of the physicians was properly excluded. (2 R. S., 422, § 73; *Sloan v. N. Y. C. R. R.*, 45 N. Y., 128; *Johnson v. Johnson*, 4 Paige, 467; 14 Wend., 641; 1 Greenl. on Ev., § 243; 1 Bradf., 378; *Brand v. Brand*, 39 How. Pr., 193; *Rogers v. Lyon*, 64 Barb., 373.)

MILLER, J. Numerous objections were made upon the trial, to the rulings of the judge, in regard to the admission of evidence, and these decisions are properly the first subject for consideration. It is claimed that the court erred in overruling the objection of the defendant to the admission of the several policies of insurance, without the applications upon which they were founded and which it is insisted were the basis of and formed a part and parcel of the same. Each of the policies recites that in consideration of the representations made on the application for the same, the insurance is made, but it does not make the application a part thereof or in any other way or manner refer to the application. It is of itself a complete contract without the application and so far as that may be considered as material in affecting or changing its true import, it would more properly belong to the defendant to introduce it in evidence. It is true it is stated in each of the applications, that it is agreed that the particulars required from persons proposing to effect insurances shall form a part of the contract with the company; but as no reference whatever is made to the application in either of the policies, and it is not required to make a complete contract, or to explain the meaning of the same, and as the application properly belonged to and was left in the possession of the company for its benefit, no good reason is apparent why the plaintiff should introduce it as a portion of his testimony.

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Neither of them constitute a part of the instruments upon which the action was brought, and the rule that a portion of a writing cannot be received as evidence while a part is withheld is not applicable when the policy itself does not show affirmatively that the application for insurance constituted a part of it. But even although the applications were originally required to be introduced in evidence by the plaintiff, if any error was committed in this respect it was waived by the subsequent introduction of the same by the defendant, and the exception was thus neutralized. (*Rich v. Rich*, 16 Wend., 666.)

It is also urged that there was error upon the trial in excluding the declarations of the assured as to the condition of his health, made at various times, and to different persons. One of the offers made was an application of the assured to the *Ætna* Life Insurance Company for an insurance upon his life, dated May 17, 1867, in which was contained certain answers, statements and representations as to his health, physical condition and other subjects, upon which he made answers in the applications that, before the policies mentioned in the complaint were issued, he was afflicted with certain diseases, contrary to the representations made in the applications presented to the defendant, and that the application to the *Ætna* Life Insurance Company shows this. The others were the declarations and admissions, which he made as to his diseases and physical condition, to the effect that he was afflicted with some of the diseases referred to in the applications, and was of unsound health. Most of these declarations embraced a period some time prior to the issuing of the policies, and some of them extended beyond that period of time. The various decisions in regard to these statements and declarations may all properly be considered together. The object of the evidence offered was to establish the defence set up, that there was a breach of warranty, by proving the existence of diseases which he had denied he was afflicted with, in his answers to the applications made to the defendant. The action here was brought by an assignee of the policies, and the rule appears

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to be well settled in this State that the declarations of the assignor are not admissible against the assignee. This rule has been applied to the holder of a negotiable promissory note (*Paige v. Cagwin*; 7 Hill., 361), and the assignee of a mortgage. (*Booth v. Sweezy*, 8 N. Y., 276; *Foster v. Bears*, 21 id., 247; *Schenck v. Warner*, 37 Barb., 258.) It is also held that the admissions of a party insured, made after the plaintiff obtained the policy, as to his habits, are not competent. (*Ravels v. The Am. Mut. Life Ins. Co.*, 27 N. Y., 282.) The cases cited do not decide the precise point here raised, but we think it is fully considered in a recent decision of this court, in the case of *Swift v. The Massachusetts Mutual Life Ins. Co.* (63 N. Y., 186). In that case proof was offered of statements made by the insured prior to the insurance, and "in immediate reference to his acts, and to facts in his then bodily condition." One of the grounds of the defence was, that the insured concealed the material fact that he had a scrofulous complaint. There was proof to show that the assured was lame, that members of his family had died of scrofula, and of its tendency to become hereditary, and also tending to show that he had this disease before and at the time when he died. The declarations were offered in connection with these facts, and it was held to be a reasonable and conclusive way of showing a person's knowledge of his bodily condition, to prove declarations concerning it, concurrent with some fact or act in relation thereto, and that when declarations are made, not too long before the application and examination, and when a part of the *res gestae* of some act or fact, exhibiting a condition of health which they legitimately tend to explain, they are admissible to show knowledge in the insured of his physical condition. The authorities bearing upon the question presented were discussed and examined, and a review of them is not now required. It is sufficient to say that, within the cases to which reference is made in the case last cited, as well as the principle there laid down, the testimony was not admissible, and was properly excluded. No act of the insured

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was offered in evidence, but mere declarations alone, without any fact which established his condition of health, or which constituted a part of the *res gestæ*. This case bears no analogy to that last cited, and within the latter the ruling here can be upheld.

The testimony of the physicians, offered upon the trial, we also think was properly rejected, for the reason that the information asked for was obtained by the several physicians while attending the insured, as a patient, in a professional character, and was therefore privileged within the provision of a statute of this State. (2 R. S., 406, § 73.) The statute is very explicit in forbidding a physician from disclosing any information received by him which is necessary to enable him to prescribe for a patient under his charge. It is a just and useful enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship. The point made that there was no evidence that the information asked for was essential to enable the physician to prescribe is not well taken, as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient. Aside, however, from this, the statute in question, being remedial, should receive a liberal interpretation, and not be restricted by any technical rule. When it speaks of information it means not only communications received from the lips of the patient but such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearance and symptoms. Even if the patient could not speak, or his mental powers were so affected that he could not accurately state the nature of his disease, the

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astute medical observer would readily comprehend his condition. Information thus acquired is clearly within the scope and meaning of the statute. None of the cases cited by the appellant's counsel are in conflict with the interpretation given. In *Kendall v. Gray* (2 Hilt. 300), the judge, in his remarks as to the general rule of evidence on the subject, gives full force to the statute, and applies it to physicians while attending patients professionally. The evidence there offered also was not from the physician, and the communication does not appear to have been made the basis of a prescription, and it was held to be competent. In *Hewit v. Prince* (21 Wend., 79), it was held that a physician who had been consulted by the defendant as to the means of procuring an abortion was not privileged from testifying. This is not a case in point, and the decision was placed upon the ground that it was doubtful whether the communication to the physician could be considered as made while consulting him professionally, and that the information given was not essential to enable him to prescribe for the patient. Neither of these cases sustain the doctrine contended for by the appellant's counsel.

It is also urged that as to Dr. Carpenter there was a covenant that he was competent and empowered to give information as to the state of health of the insured, and as to other matters, and it was competent for the insured to waive the privilege, and he did so waive it as to Carpenter. He was the medical referee for the purpose of answering inquiries as to the condition of health of the insured, with a view of enabling the defendant to determine the accuracy of his statements in the applications. The offer of evidence made in connection with the testimony of Dr. Carpenter was general in its character, embracing all the physicians who had attended and prescribed for the insured, and not being restricted to proof from him as a medical examiner the question does not arise whether it would have been competent if made in that qualified form.

There is no ground for claiming that the right of objecting

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to the disclosure of a privileged communication is strictly personal to the party making it, or to his personal representatives, and that it cannot be available to a third party. No valid reason is shown why an assignee does not stand in the same position in this respect as the original party, and the decease of the latter cannot affect the right of the former to assert this privilege. The authorities cited to uphold a contrary doctrine do not go to the extent claimed with the single exception, perhaps, of *Allen v. The Public Administrator* (1 Brad., 221), where the question presented was decided as apparently arising during the progress of the hearing. It is subsequently reported at page 378 of the same volume where the will was admitted to probate, and although the case was heard in the Court of Appeals, it does not appear that the point first decided was considered or determined. How far a distinction may be held to exist where the question arises upon the probate of a will and a case where an assignee has acquired a right, it is not necessary to determine at this time, but the general rule is well settled that the protection which the law gives to communications made in professional confidence does not cease upon the death of the party. The seal which the law fixes upon such communications remains unless removed by the party himself or by his legal representative. (1 Greenl. Ev., § 243.)

It is also urged that section 390 of the Code, by virtue of which a party to an action may examine the adverse party as a witness in the same manner as other witnesses may be examined, abrogates the privilege; and as it would have been competent, if the applicant had been living, to have examined him as a witness no privilege can be interposed by reason of his death. Some cases are cited to sustain this position which have reference to the relationship between attorneys and their clients while both are alive, and the effect of the section cited upon the same. It is not necessary to determine whether these decisions can be upheld as these cases present somewhat of a different question. But even if there be any valid ground for holding that while the parties are alive the Code sweeps

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away the common law rule established in the interest of justice and on grounds of public policy that communications made confidentially between an attorney and his client are privileged and should be protected, it by no means necessarily follows that the positive enactment of a statute which established the same rule which previously had no existence in reference to the relationship existing between the physician and his patient is to be regarded as nugatory. The section of the Code and the statute referred to are in entire harmony, and as a repeal by implication is not to be encouraged each of them can be enforced without any inconsistency. It is not to be assumed that the legislature intended to repeal a law which was enacted to prevent the disclosure of information acquired by medical men in a professional capacity and to remove what was previously regarded as a reproach upon the administration of justice without some clear and emphatic indication to that effect. (*People v. Street*, 3 Park. Cr., 673; 3 R. S. [2d ed.], 737.) This is wanting and we think that the statute remains in full force and has not been affected by the provision of the Code cited.

There was no error in the refusal of the judge to dismiss the complaint or to direct a verdict in favor of the defendant. A more serious question arises as to the refusal of the judge to allow the defendant to go to the jury as requested or to present any questions to the jury. On each of the applications for insurance, the applicant was asked the following questions: "How long since you were attended by any physician? For what diseases? Give name and residence of your usual medical attendant?" On the first and second applications he answered "Dr. Carpenter has known me two years." Upon the third application he answered "have none; only consulted Dr. O. H. Carpenter now and then for slight ailments and taken his prescriptions; C. H. Carpenter, Geneva, has known me three years." In regard to the answers made to the questions put upon the first and second applications it is quite obvious that the answers were not in response to the same, but as no objection was taken on this account, and no further



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answer required at the time, it is fair to assume that it was satisfactory and there was a waiver of any additional answer. (*Fitch v. An. P. Life Ins. Co.*, 59 N. Y., 573; *Ranols v. Am. L. Ins. Co.*, 27 id., 283.) As to the answers made to the question put upon the third application, the statement made that he had only consulted Dr. Carpenter was perhaps calculated to convey the impression that he had no other physician, and it is by no means entirely clear that such was the fact. It is proven that he consulted Dr. Eastman in 1863, who made prescriptions for him, then Dr. Avery also prepared medicines for him for a week or ten days after he left Dr. Eastman in 1864 or 1866, and also treated him in 1868. Dr. Carpenter testifies that he treated him in 1866 and 1870. He cannot state as to 1868, although he had previously sworn that he had given him prescriptions during that year. Dr. Picot testifies that he prescribed for the insured in 1868. He gave him prescriptions to be used at that time, but did not attend him in any sickness, and he gave him prescriptions once in a while for two years and a-half afterwards. These were a month or two apart and given on the street. It is apparent that the testimony is not very explicit as to the correctness of the answer, and as the evidence stood it was a fair question for the jury to determine, whether the assured could be charged with an omission to give such information as the interrogatories were intended to elicit, as constituted a fraudulent suppression of the truth and vitiated the policy. Under the circumstances the defendant's counsel should have been allowed to go to the jury upon the requests made as to the suppression and fraud upon the third application in respect to the employment of a physician.

For the error in refusing to grant this request of the defendant's counsel the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur; CHURCH, Ch. J., in result.

FOLGER and RAPALLO, JJ., not sitting.

Judgment reversed.

## Statement of case.

THE PRODUCE BANK OF THE CITY OF NEW YORK, Appellant, v.  
JOSEPH MORTON et al., Respondents.

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In an action against three copartners upon a partnership obligation the summons was served upon two, and judgment was perfected by default against the two served. An execution was issued against the joint property of all the defendants and returned unsatisfied. *Held*, that plaintiff had sufficiently exhausted its remedy at law to entitle it to proceed in equity to reach joint property. (Code, § 294.)

Also, *held*, that an order amending the defect in the entry of judgment *nunc pro tunc*, made after the commencement of the equitable action, was valid and effectual,

Under the act of 1874 (chap. 600, Laws of 1874) in relation to assignments for the benefit of creditors, an omission to make and deliver verified schedules does not invalidate the assignment.

A judgment in an action to set aside an assignment for the benefit of creditors, adjudging the assignment to be null and void, directing the assignor to account before a referee, and that a receiver be appointed to take charge of the assigned property, to pay out of it plaintiff's judgment, and to hold the residue subject to the order of the court, is a final judgment, reviewable by appeal. It is not a proper case for a motion for a new trial under section 268 of the Code.

Upon appeal from an order granting a new trial, where judgment has been rendered for a specific amount, that amount, exclusive of interest after its rendition, must be the test to determine whether the order is appealable under the act of 1874 (chap. 322, Laws of 1874) prohibiting appeals where the amount of the judgment or subject-matter in controversy does not exceed \$500.

The principles decided in this case below (8 J. & S., 328) disapproved.

(Argued September 22, 1876; decided November 14, 1876.)

APPEAL from order of the General Term of the Superior Court of the city of New York ~~denying~~ granting a motion for a new trial, made under section 268 of the Code. (Reported below, 8 J. & S., 328.)

This action was brought to set aside an assignment made by the defendants Joseph Morton, Leon Weil and Alphonse Weil, composing the firm of Weil Brothers & Co., to defendant Austin Baldwin, for the benefit of creditors. The ground of the action was that the schedules made by the assignors were not properly verified.

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It appeared that in June, 1874, plaintiff commenced an action against said copartners upon a partnership obligation. The summons was served upon Morton and Alphonse Weil, and judgment was entered by default and docketed only against the two served. Execution was issued, however, against the joint property of defendants, which was returned unsatisfied. After the trial of the present action, the court, on motion, amended the judgment *nunc pro tunc* by making it in form against all the defendants, and the case was thereupon reopened and the amended judgment put in evidence. The court rendered judgment adjudging the assignment null and void, directing the assignee to account before a referee named and appointed for that purpose, the referee to report, and within ten days after confirmation of his report the assignee to pay over the moneys and property to a receiver appointed to take charge of the same, the receiver to pay out of the proceeds to the plaintiff \$458.50, the amount of his judgment with interest thereon, and to hold the residue, if any, subject to the order of the court.

*D. Judson Newland* for the appellant. This was not a case for a motion for a new trial under section 268 of the Code, and defendants are not entitled to the benefit of the provisions of that section. (*Roberts v. Prosser*, 53 N. Y., 261; *Norris v. Morange*, 38 id., 172; *Gray v. Cook*, 24 How., 432; *Wait's Pr.*, § 8, pp. 653, 654; *Sworthout v. Curtis*, 4 N. Y., 417.) Plaintiff exhausted its remedy at law against defendants before commencing this action. (2 Abb. Dig. [new ed.], 485, § 179; *Laws 1863*, chap. 392, amending § 294 of Code; *Billhofer v. Henbach*, 15 Abb. Pr., 143; *Stannord v. Mattice*, 7 How., 4; *Foster v. Wood*, 1 Abb. [N. S.], 150; *Oakley v. Aspinwall*, 4 N. Y., 518; *Sears v. Burnham*, 17 id., 448; *Neele v. Berryhill*, 4 How Pr., 16; *N. Y. Ice Co. v. N. Y. Ins. Co. of Oswego*, 23 N. Y., 357; *Thompson v. Kessel*, 30 id., 383; *Fawcett v. Vary*, 59 id., 597, 599; *Appleby v. Barry*, 2 Rob., 689; *Stimson v. Huggins*, 9 How., 86; *Fawcett v. Vary*, 59 N. Y., 597; *Hogan*

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v. *Hoyt*, 37 id., 300; *Fry v. Bennett*, 9 Abb., 45; *Prest. Bk. of Newburg v. Seymour*, 14 J. R., 219.) The assignment was absolutely void. (Chap. 348, § 2, subd. 7; *Julian v. Rathbone*, 39 N. Y., 369, 373, 375; *Werner v. Ger. Svgs. Bk.*, 2 Daly, 406; *Dash v. Van Kleeck*, 7 J. R., 477; *Goodrich v. Downs*, 6 Hill, 438; *De Camp v. Marshall*, 2 Abb. [N. S.], 374.)

*J. F. Mosher* for the respondents. The subject-matter in controversy being under \$500, the appeal should be dismissed. (Laws 1874, chap. 322, p. 378; *Walker v. U. S.*, 4 Wal., 163; *Seaver v. Bigelow*, 5 id., 208; *Smets v. Williams*, 4 Paige, 364; *Udall v. S. S. Ohio*, 17 How. [U. S.], 17; *Olney v. S. S. Fallon*, id. 19; *Vredenburg v. Johnson*, Hopk., 112; *Moore v. Lyttle*, 4 J. Ch., 183; *Anon.*, Moseley, 47.) In order to maintain this action plaintiff must have established its claim against all three of the copartners by a judgment against them at law. (2 R. S., 174, § 38; Laws 1863, chap. 392, pp. 657, 661; *Hadden v. Spader*, 20 J. R., 554; *Reubens v. Joel*, 13 N. Y., 488; Code, § 136, subd. 1; *Northern Bk. v. Wright*, 5 Robt., 604; *Lahey v. Kingon*, 13 Abb. Pr., 192; *Stannard v. Mattice*, 7 How. Pr., 4; *Pardee v. Haynes*, 10 Wend., 630; *Nelson v. Bostwick*, 5 Hill, 37, 41; *B. and D. Bk. v. Willis*, 1 Edw. Ch., 645.) It must also have exhausted its remedy at law against the joint property of the three copartners before this could be maintained. (2 R. S., 174, § 38; Laws of 1863, chap. 392, pp. 667, 661; *Beardsley Scythe Co. v. Foster*, 36 N. Y., 561; *Dunlevy v. Tallmadge*, 32 id., 457; *Child v. Brace*, 4 Paige, 309; *Farnham v. Hildreth*, 32 Barb., 277.) A motion for a new trial was proper, and the only way to obtain a review by the General Term at the stage of the case when it was made. (Code, § 268, as amended in 1867; *Church v. Kidd*, 3 Hun, 254; *Douglass v. Douglass*, 5 id., 140; *Mundorff v. Mundorff*, 1 id., 41; *Stanton v. Miller*, 65 Barb., 58; *Lawrence v. F. L. and T. Co.*, 15 How., 57; *Catlin v. Grissler*, 57 N. Y., 363, 370; *Swarthout v. Curtis*, 4 id. 415; *Wood v. Hunt*, 38

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Barb., 302, 311; *Chittenden v. Miss. Soc.*, 8 How., 327; *Tompkins v. Hyatt*, 19 N. Y., 534.)

RAPALLO, J. We are of opinion that the plaintiff had, before the commencement of this action, exhausted its remedy at law against the judgment debtors so as to entitle it to proceed in equity to reach joint property. (Code § 294.) An execution had in fact been issued against the joint property of all the debtors, and returned unsatisfied. Under that execution such property might have been taken had any been found. Although the judgment upon which the execution was issued was not in form entered against all the joint debtors, yet it appeared on the face of the judgment roll that it was founded upon a joint obligation, and should have been entered in form against all the debtors, they all being parties defendant.

This execution was effectual until set aside, and had an application been made to the court to set it aside, it would have been perfectly competent to have directed an amendment of the judgment and docket, and allowed the execution to stand. The defect was one of form merely; all the requirements of the statute had been substantially complied with, the plaintiff was entitled to a judgment against all the defendants, and this appeared upon the face of the record, no extrinsic proof being required. The order amending the defect in the entry of the judgment *nunc pro tunc* was, we think, valid and effectual. (*Hart v. Reynolds*, 3 Cow. 42, note; *Chichester v. Cande*, 3 Cow., 39; *Mackay v. Rhineland*, 1 Johns. Cas. 410; *Hogan v. Hoyt*, 37 N. Y., 300; *Fanocett v. Vary*, 59 N. Y. 597, and cases cited; Code §§ 173, 174; *Close v. Gellespey*, 3 J. R., 526; *Bradford v. Read*, 2 Sandf. Ch. 163.)

But although the plaintiff had a standing as an execution creditor sufficient to entitle it to assail the assignment, it has not, in my judgment, shown sufficient cause for setting the assignment aside. The only points urged against it were that the affidavit to the schedules or inventory was made before a

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person not legally qualified to administer the oath, and that the schedules and bond were not filed in the proper office.

In the case of *Juliand v. Rathbone* (39 N. Y., 369) it was held that the making and delivery of the verified schedules required by section 2 of the act of 1860 (chap. 348), was essential to the validity of the assignment. But since that decision the legislature passed the act of 1874 (chap. 600, p. 824), which provides that the omission to make or deliver the schedule shall not invalidate the assignment. We think that it was the intent of this act to abrogate the rule laid down in *Juliand v. Rathbone*, and that the provision allowing the assignee within six months to file schedules, was not intended as a condition, the breach of which should invalidate the assignment. It can hardly be supposed that it was the intention of the legislature to leave it uncertain during the six months allowed for filing the schedules, whether the title to the property was in the assignee, or to deprive him during that interval of the power of making any valid disposition of it.

There was no proof that the bond was not filed in the office of the county clerk, nor was there any allegation in the complaint of any omission in respect to the assignee's bond. The complaint rests wholly on the omission to deliver verified schedules.

We therefore agree, upon the merits, with the conclusion arrived at by the court at General Term. But the point is made that the case was not properly before the General Term, and that it was not a proper case for a motion for a new trial under section 268 of the Code. We are inclined to the opinion that this point is well taken, and that the judgment was final and reviewable by appeal. There was nothing left to be judicially determined. The amount of the plaintiff's claim was ascertained, judgment was rendered that the assignment be set aside, that the assignee deliver over the assigned property to a receiver, and that the plaintiff be paid out of the proceeds the amount of his claim, and costs. This was a final disposition of the whole controversy, and no further judgment was to be rendered. The machinery of a reference

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and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case.

But the respondent claims that the case is not appealable to this court, the amount in controversy being less than \$500. (Laws of 1874, p. 378.) The judgment was entered July 21, 1875, and the sum directed to be paid to the plaintiff for principal and interest amounted to only \$491.20. That judgment is all that the appellant has at stake. A new trial has been ordered, and the object of this appeal is, by the reversal of that order, to restore the judgment. We think in such a case the amount of the judgment, when entered, must govern the question of appealability, and that interest accruing after its rendition cannot be added for the purpose of bringing it up to the requisite amount. According to our construction of the act of 1874, it prohibits an appeal from an order granting a new trial, where the amount of the judgment or subject-matter in controversy does not exceed \$500. In appeals from orders granting or refusing a new trial, where judgment has been rendered for a specific amount, that must be the test. Where there is no judgment, or it is not for a specific sum, the value of the subject-matter in controversy must be ascertained.

The appeal should be dismissed, with costs.

All concur; MILLER, J., in result.

Appeal dismissed.

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LAWRENCE BYRNES, Respondent, v. THE CITY OF COHOES,  
Appellant.

Where exceptions have been taken upon a trial it is, in general, erroneous to direct a verdict subject to the opinion of the court at General Term; but if the parties consent to such a disposition of the case, this is an abandonment or waiver of the exceptions, and they will be disregarded. Defendant made, in one of its streets upon which was situated a lot belonging to plaintiff, a gutter and curb, which ended opposite plaintiff's lot, and which conducted the water of the ward down that street; the water having no outlet, flowed upon plaintiff's lot, flooding his house,

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etc. Before this gutter was made there was a natural course which took off the water another way. A drain could have been made to carry it off. In an action to recover the damages, *held*, that the facts established a cause of action.

The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply where the necessity for the drainage is caused by the act of the corporation itself.

(Argued September 22, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department in favor of plaintiff, entered upon an order directing judgment upon a verdict. (Reported below, 5 Hun, 602.)

This action was brought to recover damages for the flooding of plaintiff's house and premises, alleged to have been occasioned by the neglect of defendant to provide a sewer or outlet to carry off the water from the street gutter in front of plaintiff's premises.

Various exceptions were taken by defendant upon the trial, but at the conclusion thereof the counsel for the respective parties agreed as to the amount of damages, and consented that a verdict might be directed for plaintiff for the amount so agreed upon, subject to the opinion of the court at Special Term. A verdict was directed and rendered accordingly.

The facts appearing upon the trial are stated in the opinion.

*Samuel Hand* for the appellant. The judge had no power to order a verdict subject to the opinion of the court, exceptions having been taken to the admission or exclusion of evidence. (*Bell v. Shibley*, 33 Barb., 610, 614; *Purchase v. Mattison*, 25 N. Y., 211; *Sackett v. Spencer*, 29 Barb., 180; *Briggs v. Merrill*, 58 id., 389; *Chambers v. Granston*, 7 Bosw., 414; *Bang v. Palmer*, 16 How., 542; *Havemeyer v. Cunningham*, 8 Abb., 1.) It was error to allow plaintiff to show what was done after the injury to prevent the overflow. (*Dougan v. Champ. Co.*, 56 N. Y., 8.) Defendant was not obliged to provide sewerage. (*Kavanaugh v. City of Bklyn.*, 38 Barb., 232; *Cole v. Trustees of Medina*, 27 id., 218;



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*Hines v. City of Lockport*, 50 N. Y., 236; *Mills v. City of Bklyn.*, 32 id., 489; *Wilson v. Mayor, etc.*, 1 Den., 595.)

*Olin A. Martin* for the respondent. Defendant was liable for the injuries complained of. (*Roch. W. L. Co. v. City of Roch.*, 3 N. Y., 463; *Delmonico v. Mayor, etc.*, 1 Sandf., 222-226; *McCarty v. City of Syracuse*, 46 N. Y., 194; *Conrad v. Trustees of Ithaca*, 16 id., 158; *Lacour v. Mayor, etc.*, 3 Duer, 406; *Bailey v. Mayor, etc.*, 2 Den., 443; *Barton v. City of Syracuse*, 36 N. Y., 54; *Hines v. City of Lockport*, 50 id., 236; *Donohue v. Mayor, etc.*, 3 Daly, 65-68; *Whart. on Neg.*, 264; *Dillon on Mun. Corps.*, §§ 774-778; *Nevins v. Peoria*, 41 Ill., 508; *Phinizy v. City Council of Augusta*, 47 Ga., 260-268; *St. Peter v. Denison*, 58 N. Y., 416; *Bradt v. City of Albany*, 5 Hun, 592; *O'Brien v. St. Paul*, 18 Minn., 176; *Columbus v. Woolen Co.*, 33 Ind., 435; *City of Dixon v. Baker*, 16 Am. R., 591; *City of Aurora v. Reed*, 57 Ill., 29; *Pettigrew v. Vil of Evansville*, 25 Wis., 223; 3 Am. R., 50; 1 Den., 595; *Wood on Nuis.*, § 744.)

RAPALLO, J. The facts were not in dispute on the trial of this action, and it was a proper case in which to direct a verdict subject to the opinion of the court, but for the exceptions taken during the course of the trial. Where a verdict is taken subject to the opinion of the court, the question to be decided at General Term is, which party is entitled to final judgment on the facts proved at the trial; whereas, upon exceptions, the question ordinarily is whether or not a new trial shall be granted. It is manifest that the two proceedings are inconsistent, and that where exceptions have been taken it is in general erroneous to direct a verdict subject to the opinion of the court. Such a course would deprive the excepting party of the benefit of his exceptions.

But it appears, in this case, that at the close of the trial it was conceded by both parties that there was no dispute about the facts, the amount of damages was agreed upon, and both parties expressly consented that a verdict be directed for the

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plaintiff subject to the opinion of the court at General Term. This consent necessarily involved an abandonment or waiver of the exceptions which had previously been taken during the trial and amounted, in substance, to an agreement to submit to the court at General Term the question which party should have judgment on the undisputed facts established by the evidence. The exceptions must therefore be disregarded on this appeal.

The facts established at the trial, as stated by the court at General Term and assumed on the argument here, were that the defendant made a gutter and curb in Main street (on which street the plaintiff's lot was situated) and conducted the water of the fourth ward of the city of Cohoes down that street; that the curb and gutter ended opposite plaintiff's lot; that before the curbing was made there was a natural course which took off the water another way; that the curbing brought it to the plaintiff's lot; that the gutter was not complete in front of plaintiff's place; that the water came down Main street and down the gutter and had no outlet and flooded plaintiff's house and did the damage complained of; that the water flowed direct from the gutter on the premises; that a drain could have been built so as to carry off the water, and that a well-hole was afterwards fixed so as to carry off the water.

We are of opinion that on this state of facts the plaintiff was entitled to recover. Diverting the water from its natural course so as to throw it upon the plaintiff's premises, without providing any outlet, and thus injuring his building, was a wrong for which he was entitled to redress. The cases cited on the part of the appellant to the effect that a municipal corporation is not liable for an omission to supply drainage or sewerage, do not apply to a case where the necessity for the drainage or outlet is caused by the act of the corporation itself.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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ISAAC M. SLOMAN, Appellant, v. THE GREAT WESTERN RAILWAY COMPANY, Respondent.

Where a railroad company receives the trunks of a passenger with notice that they contain property other than the passenger's baggage, and charges and receives an extra compensation for their transportation, an agreement to carry the property as freight may be inferred therefrom, and proof of these facts will sustain a recovery for loss of the property. Where in such case the property is not that of the passenger, but is in his hands as agent of the owner, and he makes the contract and pays the compensation for its carriage for account of and in the conduct of the business of his principal, an action is properly brought in the name of the latter to recover for the loss.

Plaintiff's son, a lad eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggagemaster at a railroad depot, and when asked where he wanted them checked to, replied that he did not then know, as he had sent a despatch to a customer at F. to know if he wanted any goods; if not he wanted them to go to R., where he expected to meet some customers. Soon after he had them checked to R., paying two dollars and receiving a receipt ticket for them, headed "receipt ticket for extra baggage," etc. They were not weighed, and no evidence was given as to any regulation of the company in reference to charging extra compensation for passengers' baggage. *Held*, that the evidence justified the submission to the jury of the question of notice as to the contents of the trunks.

*Sloman v. Great Western Railway Company* (6 Hun, 546) reversed.

(Argued September 26, 1876; decided November 14, 1876.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department reversing a judgment in favor of plaintiff, entered upon a verdict and granting a new trial. (Reported below, 6 Hun, 546.)

This action was brought to recover damages for injury to the contents of certain trunks belonging to plaintiff.

Plaintiff's proof on the trial was in substance as follows:

The plaintiff was a wholesale clothing merchant in Rochester. His son Marcus was traveling for him as agent, and selling his goods. On the 18th of August, 1873, he was at

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Flint, Michigan. He had with him two large trunks, thirty-six inches in length, twenty-seven inches in depth, and twenty-four inches in width, one covered with oil cloth, the other of wood, weighing about 300 pounds apiece when full, filled with samples of clothing. The trunks, with their contents, belonged to plaintiff. They were only used to transport goods, and contained no personal baggage. On the afternoon of that day Marcus left Flint to return to Rochester. About fifteen minutes before the train left, he presented himself with his trunks to the baggagemaster, who asked where he wanted his trunks checked to. He replied that he did not know at that time, as he had sent a dispatch to a customer at Fentonville, to know if he wanted any goods, and if he did not he would go to Rochester, as he expected to meet some customers on the train. Just before the train started he procured his trunks to be checked to Rochester, and took a receipt for the same as extra baggage, in the following words and form, paying two dollars charges:

"No. 20.

FLINT AND PERE MARQUETTE RAILWAY.

RECEIPT TICKET

FOR EXTRA BAGGAGE AND DOGS.

17 Station,.....18-8,.....1873.

Name, Pass .....to Rochester.

Particulars, 2 Trunks ....lbs. Amount, \$100.

Received.

B. WILLIAMS,

*Agent and Baggagemaster."*

The son and the baggage started on their eastward journey, in which they entered upon the defendant's road at Detroit, or Windsor. On reaching the Welland canal, in consequence of the draw in the bridge across it having been left open, the engine and baggage car of the train containing the trunks were precipitated into the canal, and the goods were damaged.

The defendant's counsel, after the plaintiff's case was closed, and also, after all the proofs were closed, moved for a nonsuit upon the following grounds: First, that there was no con-

## Statement of case.

tract between the plaintiff and the defendant. Second, that the goods were not the goods of a passenger. Third, that the goods were not ordinary baggage. Fourth, that there was no evidence to submit to the jury upon the question whether the defendant's agent was notified that the baggage was other than ordinary baggage. The motion was denied, and the defendant's counsel excepted.

The following questions were submitted to the jury specifically, defendant's counsel objecting and excepting:

"First. Did the baggagemaster at Flint at the time of the reception of the property in question, have notice that the trunks delivered to him by Marcus I. Sloman contained other than his ordinary personal baggage?"

"Second. Were these trunks precipitated into the Welland canal by the gross negligence of the defendant's agents or servants?"

Both were answered by the jury in the affirmative, and a general verdict rendered for the plaintiff. Further facts appear in the opinion.

*W. F. Cogswell* for the appellant. The action was properly brought in plaintiff's name. (Story on Ag., §§ 418, 420, 421; *Grant v. Newton*, 1 E. D. S., 97; *Filer v. N. Y. C. R. R. Co.*, 49 N. Y., 55; *Hawkins v. Hoffman*, 6 Hill, 586.) Defendant is liable by reason of its special agreement to carry the property evidenced by the receipt. (*Stoneman v. E. R. Co.*, 52 N. Y., 429; *Ham. R. Co. v. Smith*, 12 Wal., 262; *Butler v. H. R. R. Co.*, 3 E. D. S., 571; *Winter v. Pac. R. R. Co.*, 41 Me., 503.) Plaintiff can recover if the baggagemaster at Flint when he received the trunks, and charged extra for them, had notice that they were not the personal baggage of the passenger. (*Glasco v. N. Y. C. R. R. Co.*, 36 Barb., 12; *Hannibal R. R. Co. v. Swift*, 12 Wall., 262, 272, 274; *Stoneman v. The Erie Railway Co.*, 52 N. Y., 429; *Butler v. H. R. R. Co.*, 3 E. D. Smith, 571.)

*E. C. Sprague* for the respondent. There was no contract or any other relation between plaintiff and defendant

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upon which the latter was liable. (*Beecher v. G. E. R. Co.*, 52 B., 241; *Weed v. Sar. R. Co.*, 19 Wend., 534; *Richardson v. N. Y. C. R. Co.*, 98 Mass., 85.) Plaintiff cannot recover because the goods were not the property of the passenger. (*Richards v. Westcott*, 2 Bos., 589; 7 Bos., 6; *Dexter v. Syracuse R. Co.*, 42 N. Y., 326; *Richardson v. N. Y. C. R. Co.*, 98 Mass., 85; *Eaton v. D. L. and W. R. Co.*, 57 N. Y., 382.) Defendant was not bound by the act of the baggagemaster, even if he had notice that the trunks contained merchandise, and agreed to transport them as he had no power to contract to transport freight. (*Eaton v. D. L. and W. R. Co.*, 57 N. Y., 382; *Mattison v. N. Y. C. R. Co.*, id., 552.) There was no notice to defendant that the trunks were not ordinary baggage. (*Cincinnati and Co. R. Co. v. Marcus*, 38 Ill., 219; *Hawkins v. Hoffman*, 6 Hill, 586; *Bel. R. Co. v. Keys*, 9 H. of L. cases, 556; *Pardee v. Drew*, 25 Wend., 459, 462; *Dexter v. Syracuse R. Co.*, 42 N. Y., 326.) The question of the character of the negligence was one of law. (*Nicholson v. Erie R. Co.*, 41 N. Y., 525; *French v. B., N. Y. and E. Co.*, 4 Keyes, 108; *Wells v. N. Y. C. R. R. Co.*, 24 N. Y., 181; *N. Y. C. R. R. Co. v. Lockwood*, 17 Wall., 357; Whart. on Neg., § 49.)

RAPALLO, J. The judge submitted to the jury the question whether the baggagemaster at Flint, at the time of the reception of the property in question, had notice that the trunks delivered to him by Marcus J. Sloman contained other than his ordinary personal baggage. To this question the jury rendered an affirmative answer.

The fact thus found by the jury seems to us decisive of the case, provided the finding can be sustained. It is in evidence that the baggagemaster of the defendant charged and received for the transportation of the two trunks the sum of two dollars, in addition to the fare of Sloman for his passage. If the trunks and this compensation were received with notice that the trunks contained property other than the baggage of the passenger, then there is evidence of an agreement aside from

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the contract to transport the passenger, and for a separate consideration, to carry such property as freight, and this will sustain the recovery. (*Stoneman v. Erie R. Co.*, 52 N. Y., 429; *Hannibal R. Co. v. Swift*, 12 Wall., 262, 274; *Butler v. H. R. R. Co.*, 3 E. D. Smith, 571; *Winter v. Pac. R. R. Co.*, 41 Mo., 503.)

If this finding is sustained, it disposes of the objection that the action is improperly brought in the name of the present plaintiff, and also renders the questions raised on the subject of negligence immaterial. The plaintiff was the sole owner of the trunks and their contents, which consisted wholly of merchandise. The passenger was his agent, and made the contract and paid the compensation for the carriage of the goods in the conduct of the plaintiff's business, and for his account. It is conceded by the appellant's counsel, in his brief, and is a proposition which cannot be disputed, that if the agent of the plaintiff had not been a passenger, and had made a contract for the carriage of the trunks, as freight, the defendant would be liable to the plaintiff. It is equally clear that, if such was the contract, the fact that the agent went as a passenger on the same train with the goods did not impair the rights of the plaintiff.

The court at General Term placed its decision granting a new trial on the sole ground that there was no evidence to show that the baggagemaster who received the trunks had notice of the fact that they contained any thing other than the ordinary baggage of Marcus J. Sloman, the agent of the plaintiff. It does not appear that it was stated, in terms, to the baggagemaster what the trunks contained, but the jury had the right to consider the surrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggagemaster, and the dealing between them, and if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight.

It appears that the passenger, Marcus J. Sloman, was a lad

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of eighteen, the son of the plaintiff, and employed by him, on a salary, as traveling agent to sell clothing by sample, and that the trunks in question contained the samples. He had with him, besides the two trunks, a valise which contained his personal baggage. The trunks, as described in the evidence, do not appear to have presented the appearance of ordinary traveling trunks. They were thirty inches long, twenty-seven deep and twenty-four wide. One was covered with oil-cloth and the other was of wood. Marcus testified that the baggagemaster at Flint asked him where he wanted them checked to, and he replied that he did not know at that time, as he had sent a dispatch to a customer at Fentonville to know if he wanted any goods, and if he did not, he (Marcus) wanted to go to Rochester, as he expected to meet some customers on the train; that shortly before the train was due, witness bought a ticket for Rochester, and went to the baggagemaster and asked him to check the trunks to Rochester, which he did, and witness paid him two dollars. The trunks were not weighed, and it does not appear in the evidence for what the charge of two dollars was made. The baggagemaster gave witness a written receipt for the two trunks, headed "receipt ticket for extra baggage and dogs." The baggagemaster was called by the defendant as a witness. He gives a different statement of the conversation; says that Sloman paid him only one dollar; admits that the baggage was not weighed, but does not state what the dollar was paid for, nor whether he understood what the trunks contained, nor whether he received them as baggage or freight; neither was there any evidence as to any regulation of the company for charging extra compensation for the carriage of baggage of passengers.

We think that, upon this evidence, the judge was justified in submitting the question of notice to the jury. If they believed the testimony of the young man, Marcus, the baggagemaster had notice that he was traveling for the purpose of selling goods, and carrying these trunks for that purpose, as the place to which he wished them carried depended upon



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his meeting with customers. It was highly improbable that a lad of his age, and traveling on such business, would carry with him such large trunks for the transportation of his personal effects; and the fact that the baggagemaster charged or received extra pay for their carriage is some evidence that they were not regarded as ordinary traveler's baggage, especially as the defendant did not offer any explanation of what the charge was for. From all the circumstances, the jury were, we think, authorized to draw the inference that the baggagemaster understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; that he was not entitled to have them carried as his ordinary baggage, and therefore the extra charge was made, and they were carried as freight.

The point is raised, on this appeal, that the evidence does not show that the baggagemaster had authority to receive the trunks as freight. No such point was raised at the trial, nor was there any evidence that it was out of the usual course of business, or contrary to the regulations of the company, to transport freight on the passenger trains. The only evidence on that point is the testimony of the baggagemaster that he had nothing to do with the freight department. The authority of the baggagemaster seems to have been assumed, and he was, in the receipt given for the trunks, as well as in the motion for a nonsuit, designated as the agent of the defendant. The motion for a nonsuit was made upon the express ground that there was no evidence to submit to the jury upon the question whether the defendant's agent was notified that the baggage was other than ordinary baggage. His authority to receive it, if it was not ordinary baggage, was not questioned. The only point was, whether there was evidence of notice to him. It is too late now to raise the question of his authority. If it had been raised on the trial, evidence might have been given on that subject.

We have examined the other exceptions taken in the case, but do not find in them sufficient ground for reversing the judgment.

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The order of the General Term should be reversed, and the judgment entered on the verdict affirmed, with costs.

All concur; ALLEN, J., not voting.

Order reversed and judgment affirmed.

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**JULIUS H. RODBOURN, Respondent, v. THE SENECA LAKE  
GRAPE AND WINE COMPANY, Appellant.**

67	215
130	577
180	585

One C. contracted to erect a building on defendant's premises, eighty per cent of the contract-price to be paid during the progress of the work, the residue when it was completed. After the eighty per cent was paid, a mechanic's lien was filed for materials furnished to C. In an action to foreclose the same, defendant offered to prove that the contractor became unable to complete the building, and, after the filing of the lien, defendant, in order to complete it, was forced to, and did, purchase materials and pay for labor to an amount exceeding the residue unpaid. The evidence was excluded. *Held*, error; that expenditures made under such circumstances could not be treated as payments to the contractor upon his contract, which would, under the mechanic's lien law of 1854 (chap. 412, Laws of 1854, as amended by chapter 558 of Laws of 1869) render the owner liable to a material-man, even although there was no formal abandonment of the contract.

*McMillan v. Seneca Lake Grapes and Wine Company* (5 Hun, 12) reversed.

(Argued September 28, 1876; decided November 14, 1876.)

**APPEAL** from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, *sub nom. McMillan v. S. L. G. and W. Co.*, 5 Hun, 12.)

This was an action to foreclose a mechanic's lien. The original plaintiff was George McMillan; after judgment, he assigned it to the present plaintiff, who was substituted as plaintiff.

In July, 1871, defendant contracted with S. B. Coe for the erection, by the latter, of a building upon its premises, in Yates county. Eighty per cent of the contract-price Coe was to

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receive during the progress of the work, and the balance when the building was completed. McMillan sold and delivered to Coe a quantity of lumber to be used, and which was used, in the construction of said building. Within thirty days after the delivery of the last of said lumber, and on the 28th February, 1872, McMillan filed a notice of lien for a balance unpaid to him. Previous to the filing of such notice, defendant had paid more than the eighty per cent.

Upon the trial, defendant offered to show that "on the 28th of February, 1872, the contractor became unable to complete the building or to advance the necessary funds to purchase material therefor, and to pay laborers thereon, and that the defendant, in order to complete the said building, was forced to, and did, purchase materials therefor, and pay laborers thereon, to an amount exceeding the price agreed to be paid in said contract." This was objected to by plaintiff as incompetent and immaterial. Objection sustained, and exception taken by defendant.

The referee directed judgment for the balance unpaid upon the contract at the time of filing the notice.

*William Rumsey* for the appellant. The motion for a non-suit should have been granted, even after the evidence of the contractor had been received. (*Haswell v. Goodchild*, 12 Wend., 373, 376; *Sullivan v. Brewster*, 1 E. D. S., 681, 685; *McKyring v. Bull*, 16 N. Y., 303.) The referee erred in excluding the evidence that, on February 28, 1872, the contractor became unable to complete the building or purchase material therefor, or pay for labor thereon, and that defendant, in order to complete the building, was obliged and did expend more than the sum agreed to be paid on the contract. (*Smith v. Ferris*, 1 Daly, 19, 22; *Ferguson v. Burk*, 4 E. D. S., 760; *Doughty v. Devlin*, 1 id., 625, 634; *Owens v. Ackerson*, id., 691; *Miner v. Hoyt*, 4 Hill, 193; *Smith v. Coe*, 2 Hilt., 365; 29 N. Y., 666; *White v. Maynard*, 111 Mass., 250; *Osgood v. Toole*, 60 N. Y., 475; *Bailey v. Johnson*, 1 Daly, 61; *Smith v. Brady*, 17 N. Y., 173, 188.)

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Opinion of the Court, per RAPALLO, J.

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*William S. Briggs* for the respondent. The payments made by defendant after February 28, 1872, as against plaintiff, were to be treated as no payments, to the extent of the unpaid contract-price. (*Carman v. McIncrow*, 13 N. Y., 70.)

RAPALLO, J. We think that the court erred in excluding the evidence offered to prove that the contractor became unable to complete the building; and that, after the filing of the notice of lien, the defendant, in order to complete the building, was forced to, and did, purchase materials and pay laborers to an amount exceeding the contract-price, and that the contractor did not complete the building.

Expenditures made under such circumstances should not, we think, be treated as payments to the contractor upon his contract, which should render the owner liable to a material-man who had before such payments filed a notice of lien. The amounts so paid were never earned by the contractor, nor did they belong to him. The fact that, by the terms of the contract, the owner had the right to charge such payments to the contractor did not confer any rights upon the material-man. He was entitled, by virtue of his lien, to such sums as the contractor was, at the time of the filing of the notice, or might afterwards become entitled to receive under his contract, but no more. He was protected by the statute against the extinguishment of the contractor's right by payment after notice of the lien; but payments made by the owner to third parties for work or materials which the contractor had failed to furnish, and which the owner was compelled to obtain on his own responsibility, in order to complete the building, were not prohibited by the statute; and even though there were no formal abandonment of the contract, such payments did not subject the owner to liability to the person filing the notice of lien. It is only what the contractor earns under his contract that is reached by the lien. In this case, payments made to third parties were treated as an admission of indebtedness of the owner to the contractor. We think that the owner should have been permitted to prove the circumstances under which

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the payments were made, and that the contractor was in default.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

EDWIN THOMAS, Plaintiff in Error, v. THE PEOPLE OF THE  
STATE OF NEW YORK, Defendants in Error.

67 218  
110 296

The provision of the act of 1872 (chap. 475, Laws of 1872), providing that a present opinion or impression in reference to the guilt or innocence of a prisoner, or the expression of such an opinion, shall not, in the cases specified, be a sufficient ground of challenge for principal cause, does not interfere with or affect the challenge for favor.

67 218  
115 684

Under the provisions of the act of 1873 (chap. 427, Laws of 1873), providing that either party may except to the determination of the court upon a challenge for favor, and that the court may review such decision upon writs of error or *certiorari*, this court, upon writ of error, has the same power to pass upon the question involved in the challenge which the trial court had.

A person, called as a juror upon the trial of an indictment for murder, being challenged, testified that he had heard the killing talked about, had expressed an opinion, and then had an impression or opinion, depending upon the truth of what he had heard; that he thought it would take evidence to remove that impression; but that he would decide the case on the evidence; and believed that he could render an impartial verdict upon the evidence, unbiased by such opinion. *Held*, that the trial court was justified in holding the juror indifferent.

Upon the trial, the prisoner offered to prove that the deceased had been engaged in several fights with other parties, in each of which he used a knife, and cut his opponent; also, declarations of his as to his cutting people with razors, and that all these matters had been communicated to the prisoner; the offers were overruled. *Held*, no error.

After a witness on the part of the prisoner had testified that he heard the deceased, in an angry dispute, say to the prisoner that, if he ever crossed his path again, he would fix him, the prisoner offered to show that, a few days afterward, the witness heard another person, who was present when the threat was made, state to the prisoner what the deceased threatened. The proof was excluded. *Held*, no error; as there was no suggestion that the prisoner did not hear the threat when made, or had forgotten it.

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After a witness had testified that the prisoner was a quiet man and good natured, as far as he knew, he was asked to "state what his disposition was when crossed or misused?" This was objected to, and excluded. *Held*, no error.

The crime charged was committed in State prison, where the prisoner and the deceased were confined. The prisoner gave evidence tending to show that the character of the deceased, before he came to the prison, was bad; that he was quarrelsome and vindictive. The prosecution then called witnesses, who were permitted to testify, under objection, that, in the respects stated, his character while in prison was good. *Held*, no error.

The homicide was committed with a case knife, which the prisoner, a few days before, had ground to a point. He testified that he knew where the heart was located, and that he stuck his knife into it. The court charged, among other things, in substance, that the facts that the prisoner used a deadly weapon, and struck at a vital part of the body of the deceased, are circumstances furnishing presumptive evidence of an intent to take the life of the deceased, but not conclusive. *Held*, no error.

At the time of his conviction, the prisoner was under sentence for a term, several years of which were unexpired. *Held*, that this did not prevent his being sentenced to be hung before the expiration of his term.

(Submitted October 2, 1876; decided November 14, 1876.)

ERROR to the General Term of the Supreme Court in the fourth judicial department affirming a judgment of the Court of Oyer and Terminer in and for the county of Cayuga, entered upon a verdict convicting plaintiff in error of the crime of murder in the first degree.

The prisoner and Richard Sheffield, the deceased, were convicts confined in Auburn State prison. The homicide was committed, in one of the shops of the prison, with a case knife, which the prisoner had previously ground down to a point; this he plunged into the heart of the deceased.

The facts pertinent to the different questions presented are set forth sufficiently in the opinion.

*John T. Pingree* for the plaintiff in error. The court erred in overruling the challenge for principal cause, and to the favor interposed to the juror De Witt. (Laws 1872, chap. 475; Laws 1873, chap. 467, p. 681; *Cancemi v. People*, 16

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Opinion of the Court, per EARL, J.

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N. Y., 504.) The court erred in rejecting evidence of statements of Sheffield as to his character and disposition for recklessness of human life. (*Pformer v. People*, 4 Park. Cr., 568; *Comm. v. Hilliard*, 2 Grey, 294.) The sentence pronounced was illegal and void. (5 N. Y. Stat. [Edm. ed.], 172; 1 Bishop. Cr. L. [5th ed.], § 953; *King v. Bath*, 1 Leach [4th ed.], 441; *Russell v. Comm.*, 7 S. & R., 489; *Miller v. Finkle*, 1 Park. Cr., 374; *Dawson v. People*, 25 N. Y., 405.)

*S. E. Payne* for the defendants in error. The ruling of the court, as to the prisoner's challenge to the juror for the principal cause, was proper. (1 Laws 1873, chap. 475, p. 1133; *Sanchez v. People*, 22 N. Y., 151; 4 Park Cr., 535.) The offer to show specific acts on the part of Sheffield was properly rejected. (*Eggler v. People*, 56 N. Y., 643; 2 Gray, 294.) The judge did not err in charging the jury that they could consider the character of the weapon used by the prisoner. (*Stokes v. People*, 53 N. Y., 180; *McCann v. People*, 6 Park. Cr., 630; *Foster v. People*, 50 N. Y., 608; *People v. Clark*, 7 id., 391; 27 How., 207; 13 Abb. Pr. [N. S.], 370, 378.)

EARL, J. The plaintiff in error was convicted of murder in the first degree for killing a fellow-prisoner in the Auburn State prison with a knife. The prisoner's counsel upon the trial took several exceptions to the rulings of the court, which are presented here as grounds for a reversal of the conviction, and I will examine them separately in the order in which they are presented.

First. Upon the trial George J. De Witt was called as a juror and was challenged by the prisoner for principal cause, and upon being sworn testified that he had heard the killing talked about, had expressed an opinion of the affair from what he had heard talked, and then had an impression or opinion as to the guilt or innocence of the prisoner if what he had heard was true; that he thought it would take evidence to remove that impression and that he would not go into the jury box entirely unbiased; that the impression depended

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Opinion of the Court, per EARL, J.

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entirely on the supposition that what he had heard was true; that if he went into the jury box he would decide the case on the evidence given, and that he believed if he was sworn as a juror he could render an impartial verdict upon the evidence unbiased or uninfluenced by any impression or opinion which he then had. The court then overruled the challenge. The prisoner then challenged the juror for favor and that challenge was also overruled, and prisoner's counsel excepted to each ruling and De Witt was then sworn as a juror.

The challenge for principal cause was properly overruled under the act, chapter 475 of the Laws of 1872. That act provides that a present opinion or impression in reference to the guilt or innocence of the prisoner, or the expression of such an opinion, shall not be a sufficient ground of challenge for principal cause, provided the person proposed as a juror shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence and that such opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person does not entertain such a present opinion as would influence his verdict as a juror. This provision has relation only to the challenge for principal cause and removes one of the grounds therefor in the cases mentioned. The challenge for favor is left unaffected by that act. Such a challenge is to determine the indifferency of the person proposed as a juror, and is now by the act chapter 427 of the Laws of 1873, to be tried by the court instead of triers as before provided. Before that act the decision of the triers as to indifferency was final, and not the subject of review. (*Sanchez v. The People*, 22 N. Y., 147.) But by that act it is provided that *either party* may except to the determination of the court upon the challenge and "upon writ of error or *certiorari*, the court may review any such decision the same as other questions arising upon the trial." What is the effect of this provision? Under the prior law, while the decision of the triers was final, a bill of exceptions would lie to bring up for review any exception taken to the ruling of the court in reference to such challenge or the



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admission or exclusion of evidence before the triers. (*People v. Rathbun*, 21 Wend., 509; *Sanchez v. People*, *supra*.) This provision was not therefore intended for such exceptions, but manifestly to give the court upon writ of error or *certiorari* the power to review the decision of the trial court upon the question of indifference, a power not before possessed. After the previous act as to the challenge for principal cause, it was doubtless deemed important that the courts of review should possess this additional power. We have, therefore, the same power to pass upon the question involved in the challenge for favor which the trial court had, and the question to be determined is, was the juror indifferent within the rule of law applicable to such a case? He had heard the matter talked about and had an impression or opinion as to the guilt or innocence of the prisoner. That impression or opinion depended upon the truth of what he had heard; and he testified that he would decide the case upon the evidence, and that he believed that he could render an impartial verdict upon the evidence, unbiased and uninfluenced by his impressions. Upon such a state of facts, the court properly held the juror indifferent. At least we cannot say that the court having the juror in its presence, and able to judge somewhat from his appearance, erred in its decision. He had an opinion which depended upon the truth of what he had heard. As a juror he was to find the truth of the case, and such an opinion as he had would in no way interfere with his impartial search after it. The exclusion of a juror in such a case, in these days of general intelligence and newspaper circulation, would render it impracticable in many cases to obtain a competent jury for the trial of persons charged with flagrant and notorious crimes. (*The People v. Honeyman*, 3 Denio, 121; *Lohman v. The People*, 1 N. Y., 379.)

Second. Upon the trial the prisoner was permitted to prove threats and acts of violence toward himself by the deceased, and also to prove that the general character of the deceased was bad; that he was very quarrelsome and vindictive. He offered to prove, also, that before he came to the prison, the

deceased was engaged in several fights with other parties, in each of which he used a knife, and cut his opponent; also his declarations about cutting people with razors, and that all these matters had been communicated to the prisoner. These offers were overruled, and this is now complained of as error. Even if the proof given of the general character of the deceased was competent upon the facts of this case, there is no authority for holding that proof of specific acts of violence upon other persons, no part of the *res gestæ*, and in no way connected with the prisoner, was competent. Such proof was held to be incompetent in *Eggle v. People* (56 N. Y., 642).

Third. A witness on the part of the prisoner testified that he heard the deceased in an angry dispute say to the prisoner that if ever he crossed his path again, he would fix him. The prisoner then offered to show that a few days afterward the witness heard another person, who was present when the threat was made, state to the prisoner what the deceased had threatened on that occasion to do. The offer was excluded. It is difficult to perceive how it could be important to prove the repetition to the prisoner of a threat which was made in his presence, to him, and of which, therefore, he had information. There was no suggestion that the prisoner did not hear the threat when made, or that he had forgotten it. There was no error in the exclusion of the offer.

Fourth. After a witness had been permitted to testify that the prisoner was a quiet man, and good natured so far as he knew, he was asked the following question: "State what his disposition was when crossed or misused?" This question was properly excluded. No ground was stated at the time upon which it was claimed to be competent, and it is impossible to perceive any. If the answer had been that he was quarrelsome, it would certainly not have aided him; if it had been that he was peaceful and submissive, it would have done him no good, as there is no pretence that he was either peaceful or submissive under any provocation he received at the time of the homicide.

Fifth. The prisoner gave evidence tending to show that the

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general character of the deceased, before he came to the prison, was bad ; that he was very quarrelsome and vindictive. The prosecution then called several witnesses who had known the deceased while he was in prison, and they were allowed to testify, against the objection of the prisoner, that, in respect to quarrelsomeness and vindictiveness, his character, while in prison, was good. The ruling admitting this testimony is complained of as erroneous. The prisoner having attacked the character of the deceased, and thus opened that issue, cannot complain that evidence was received on both sides of it. It matters not that the witnesses had only known the deceased in the prison ; there was a large community there, and a man can have a general character there as well as elsewhere ; and it is just as competent for witnesses to speak of that character there where they have become acquainted with it, as at any other place. The evidence may not be entitled to much weight, as a very bad man may behave well under compulsion in prison, but there can be no doubt of its competency.

Sixth. The homicide was committed with a case knife which, a few days before, the prisoner had ground to a point. He testified that he knew where the heart was located, and he struck his knife into it. The judge charged the jury, explaining the different degrees of murder, justifiable and excusable homicide and manslaughter, and then, among other things, said to the jury : " The character of the weapon is one strong circumstance in the case ; the procurement and preparation of the weapon would be a strong circumstance if you found it was procured and prepared shortly before this life was taken. The fact that this weapon was a deadly weapon, that it was struck at a vital part of the frame of the deceased, is a circumstance you have a right to consider, and must consider, in determining the character of this act ; and I charge you that the fact that this prisoner used a knife, which was in itself a deadly weapon, and that he struck a blow at the vital part of the deceased, are circumstances which furnish presumptive evidence of an intention, at the time, to take the life of the deceased ; it does not establish the fact ; you might find the

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contrary, notwithstanding that evidence being in the case, and yet it furnishes presumptive evidence; it is evidence from which such conclusion might be drawn, according as the jury shall find from all the circumstances of the case. The fact that this was a deadly weapon would furnish some presumptive evidence, and the manner in which it was used some presumptive evidence of an intent, at the moment, to take life. The mere use of the deadly weapon would not in itself furnish evidence of a premeditation and deliberate purpose to take the life entertained beforehand."

The prisoner's counsel excepted to that part of the charge wherein the judge charged that the deadly weapon furnished some presumptive evidence and the manner in which it was used—some presumptive evidence of an intent to take life; and also to that part of the charge that the fact that the prisoner used a deadly weapon and struck a blow at the vital part of the deceased are circumstances which furnish presumptive evidence of an intention to take the life of the deceased.

The exception is not well taken. This portion of the charge was simply upon the fact of killing and the intention to kill. The fact that the prisoner plunged this pointed knife into what he knew to be a vital part of the body must raise a presumption that he intended to take life. Its natural result would be to destroy life, and he must be presumed to have intended the natural consequence of his act just as if he had aimed at the heart of the deceased and fired a gun. It was not charged that the evidence was conclusive, but simply that it was presumptive, and it was left to the jury to determine the fact upon the evidence under the charge as given.

Seventh. At the time of his conviction the prisoner was under sentence in the State prison for a term, several years of which were unexpired, and the claim is made that he could not be sentenced to be hung before the expiration of his term. This is a novel claim, and seems to be based upon the idea that a prisoner under sentence has a right to serve out his term. He has no such right. His term of service may be curtailed by legislation or by executive pardon, or he may be turned

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loose by the courts or the prison officials without violating any of his legal rights.

Convicts, like other persons, are under the protection of the law and are amenable to its penalties. The laws for the punishment of crimes are general and apply to all persons in the State. Provision is made (Laws of 1847, chap. 4) for taking prisoners out of the State prison for trial upon any indictment found against them. In all cases but such crimes as are punishable with death there is no practical difficulty, as the sentence in any case may provide that the term shall commence after the expiration of the former term. (1 Bishop on Cr. Law [5th ed.], § 953.) Even in such cases, if the sentence should go into immediate effect, it is not apparent how any right of the prisoner would be violated, or what ground of complaint he would have. It certainly would be no detriment to him if he could serve out both sentences by one imprisonment. But in the case of a conviction for murder in the first degree, the court is required to proceed and pass sentence which must be executed in not less than four and no more than eight weeks thereafter. (2 R. S., 658.) It matters not whether this law is directory or mandatory. It is the duty of the court to obey it; and it follows that neither the prisoner's rights nor the laws were violated in the sentence passed in this case. To hold otherwise would give a life convict unlimited license to murder without further punishment.

Having thus given this case the careful consideration its grave nature demands the conclusion is reached that the judgment must be affirmed.

All concur; CHURCH, Ch. J., not voting; RAPALLO, J., absent.

Judgment affirmed.

## ROBERT S. KIP et al., Appellants, v. THE NEW YORK AND HARLEM RAILROAD COMPANY, Respondent.

The fact that a railroad corporation is in possession of lands as lessee under an unexpired lease is no impediment to proceedings on its part under the general railroad act to acquire title in fee; the condemnation of the title does not impair the obligation of a covenant to surrender, or any other covenant in the lease, but simply transfers them with the title.

Where, after the commencement of proceedings by a railroad corporation to acquire title to lands, it leases its road to another company for a long term of years, the lease does not, *per se*, operate to abrogate the proceedings; the land sought to be condemned may be as necessary, for the purposes of the corporation instituting the proceedings, after as before the lease; but if the necessity is only in favor of the lessee, it is competent for it to continue the proceedings in the name of the lessor.

(Argued October 2, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department in favor of defendant, entered upon an order reversing an order of Special Term which overruled defendant's demurrer to the complaint herein, and directing judgment upon the demurrer. (Reported below, 6 Hun, 24.)

This action was brought to restrain the defendant from further prosecuting proceedings commenced by it to condemn certain lands owned by plaintiffs in the city of New York, under the provisions of the general railroad act, as amended in 1869. (Chap. 237, Laws of 1869.)

The original complaint alleged, in substance, that, in 1858, plaintiffs executed to defendant a lease of the premises in question for the term of twenty-one years, with a covenant, on the part of the lessee, to surrender on the termination of the lease; that there were seven years unexpired of said term; that the act above referred to had no application to property so held under a lease; nor could proceedings be instituted until after the expiration of the lease, as otherwise it would impair the obligation of the covenants in the lease. A supplemental complaint was filed and served,

alleging that, in 1873, defendant leased its road, and all its rights, franchises and privileges, to the New York Central and Hudson River Railroad Company for the term of 401 years, and also assigned and transferred the lease from plaintiffs. It was claimed that, by means of such lease, assignment, etc., defendant waived and abrogated all right or interest to prosecute said proceedings, and terminated the necessity therefor.

The demurrer was to the original and supplemental complaint, that they did not state facts sufficient to constitute a cause of action.

*Elbridge T. Gerry* for the appellants. Defendant having absolutely conveyed to a third party Kip's lease, with full power of sale and disposal in its discretion, has no longer any interest therein or necessity therefor. (*N. Y. and H. R. Co. v. Kip*, 46 N. Y., 551; *R. and S. R. R. Co. v. Davis*, 43 id., 137.) Defendant has no longer right or power to prosecute the proceedings heretofore instituted by it, under the act of 1869, to acquire the title to the premises in question. (*R. and S. R. R. Co. v. Davis*, 43 N. Y., 137; *Adams v. Sar. R. R. Co.*, 10 id., 328.)

*W. A. Beach* for the respondent. Defendant still operates its road as regards the State and its franchises. (*Conhocton Stone Co. v. B.*, *N. Y. and E. R. R. Co.*, 52 Barb., 390; *Moody v. Mayor*, 34 How. Pr., 288; *Benson v. Suarez*, 43 Barb., 408.) This court will not interfere by injunction to stay special proceedings when the ground upon which it is asked can be there litigated. (*Bean v. Pettingill*, 2 Abb. [N. S.], 59; *McGure v. Palmer*, 5 Robt., 607; *Serback v. McDonald*, 21 How., 224.)

CHURCH, Ch. J. This action was brought to restrain the defendant from further prosecuting special proceedings instituted to condemn certain real estate in New York city. The plaintiffs had contested the proceedings upon the ground that

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there was no necessity for the appropriation of the land, but the litigation resulted in an order appointing commissioners, which was affirmed by this court. (46 N. Y., 546.) The original complaint in this action was based upon the allegation that a judgment was sought under the act of April 17, 1869, under which the proceedings were instituted, the effect of which would be to impair the obligation of the covenant in the lease under which the defendant occupies the premises for the surrender thereof at its expiration by which the plaintiffs would be largely damnified in being deprived of the use of the land until the expiration of the lease, and was therefore in violation of the United States Constitution. This point was made when the proceedings were before this court, and the decision necessarily adjudicated it adverse to the views of the plaintiffs. But aside from this it is very clear that the exercise of the right of eminent domain, either in condemning the title or the lesser estate, held by virtue of the lease, or both, in no sense would operate to impair the obligation of the covenant to surrender, or any other covenant in the lease. The rights of the plaintiffs in the land and in the lease are held as the property of all citizens is held, subject to the exercise of the power of eminent domain by the State. If the title to the land is acquired, the covenant to surrender to the plaintiffs is not impaired, but only transferred to the person or corporation acquiring the title. The owner would then be entitled to such surrender the same as if the plaintiffs had voluntarily sold and conveyed the premises. If the lesser estate is also condemned, the plaintiff's interest would be extinguished upon payment of full compensation. The lease furnishes no impediment to the acquisition of either. Nor does the circumstance, that the lessee is the party seeking the condemnation, affect the right to acquire the property in this way. There is no principle of estoppel applicable to the case, and the proceedings are not inconsistent with the rights of either party under the lease. The property of the plaintiffs is not confiscated, but is taken for public use and paid for.

In the supplemental complaint the plaintiffs allege the



leasing of the defendant's road and property to the New York Central and Hudson River Railroad Company for 401 years, and claim that such lease operated to abrogate the pending proceedings to condemn the land in question, and terminated and removed all necessity for the acquisition thereof for the corporate use of the defendant.

In this I think the learned counsel for the plaintiff is mistaken. The lease did not affect the defendant as a corporation in its relations to the State. The same necessity existed for the land proposed to be condemned after as before the lease for the purposes of the defendant as a corporation.

The allegations of the complaint are not that in fact the necessity has ceased, but that such is the legal effect of the lease of the road. Facts are admitted by a demurrer, but not conclusions of law, and the fact of a want of necessity is not admitted. It is said that the lessee may need the land, but the lessor does not, and that as the matter now stands it appears that a necessity *did*, but *does not now exist* in favor of the defendant.

For aught that appears, the same necessity exists now as did before the lease of the road, for this land, and it is legally appropriate to affirm that it exists in favor of the defendant, notwithstanding the lease. But if the necessity is only in favor of the lessee, it is a necessity for taking this land to operate the defendant's road for public use, and it is competent for the lessee to continue the proceedings in the name of the defendant. This results from the legal relation of the parties to the subject-matter of the controversy. The act of 1869, before referred to, confirms this view, and expressly authorizes proceedings to condemn land by either the original company or the lessee. It follows that the proceedings to condemn the land in question are not affected by the lease of the road. We concur substantially with the opinion in the court below, and it is unnecessary to elaborate the questions involved.

The judgment of the General Term must be affirmed.

All concur; ALLEN and RAPALLO, JJ., not sitting.

Judgment affirmed.

## Statement of case.

IN THE MATTER OF THE APPLICATION OF MARY E. PRICE FOR  
LEAVE TO SELL HER REAL ESTATE.67 231  
142 456

Where proceedings are instituted, under the statute, for the sale of the real estate of an infant (2 R. S., 194, § 170, *et seq.*), from the time of the application, the infant is to be considered as a ward of the court so far as relates to the property affected, its proceeds or income.

The special guardian is an officer of the court, and so long as the purchase money remains in his hands, and until the infant arrives at majority and receives it, the court has control over it and over the proceedings. It may correct any irregularities or error on the part of its officers in the proceedings, so as to protect a party likely innocently to suffer thereby.

In proceedings under said statute the petition stated, and the referee to whom it was referred to ascertain the facts reported, that the infant owned an undivided one-half of the premises, and this was the belief of all parties concerned in the proceedings during their progress. A sale was ordered and made, of the interest of the infant, and an order granted approving of the conveyance to the purchaser. Thereafter, in an action of ejectment against the grantee of the purchaser, it was, in effect, determined that the infant only owned an undivided one-third. The purchaser, having made compensation to his grantee for the deficiency, moved, in the proceedings, that the special guardian of the infant be required to refund one-third of the purchase-money. *Held*, that the motion was properly granted.

(Argued October 8, 1876; decided November 14, 1876.)

APPEAL by Mary E. Price from an order of the General Term of the Supreme Court in the first judicial department, reversing an order of Special Term which set aside the report of a referee and denied the prayer of Henry S. Hewson, purchaser, to be refunded certain moneys paid by him upon the purchase of the interest of said Mary E. Price, an infant. Said order appealed from, also granted the prayer of said petitioner. (Reported below, 6 Hun, 513.)

Proceedings in the above-entitled matter were commenced in 1868 to sell the real estate of said infant. The petition set forth, in substance, that Lewis Jackson died intestate seized of the premises in question leaving him surviving his widow, a daughter, and said Mary a granddaughter (daughter of a

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deceased son), his only heirs at law and next of kin. An order was entered appointing a special guardian and referring it to a referee to take proof of the facts. The referee reported the facts substantially as alleged in the petition. The report was confirmed by order and the guardian empowered to contract for a sale and conveyance of the infant's "right, title and interest." The guardian reported a contract with said Hewson. The report was confirmed and the guardian directed to convey. In February, 1869, he conveyed to Hewson the "right, title and interest" of the infant. Hewson also purchased the interest of the daughter and then conveyed the premises, by full covenant warranty deed, to Sarah Talman. In October, 1871, one Georgiana S. Jones, claiming to be a granddaughter of said Lewis Jackson, brought ejectment against Sarah Talman to recover an undivided one-third of the premises and obtained judgment therefor. Hewson, thereupon, bought the interest of said Georgiana and had it conveyed to his grantee. He, thereupon, petitioned herein that the special guardian refund to him one-third of the purchase money paid by him for the infant's interest. It was referred to a referee to take proof of the facts, with his opinion. The referee reported such facts substantially as above stated and that Hewson should be paid the one-third, with interest. Upon motion to confirm the report the Special Term denied the motion, set aside the report, and denied the prayer of the petitioner.

*John Townshend* for the appellant. The contract for the purchase by Hewson was made with the court and was between Hewson and the court. (*Veeder v. Fonda*, 3 Paige, 97.) After conveyance a purchaser is confined, as to title, to his remedy on his covenants. (Kerr on Fraud and Mistake [Am. ed.], 432, 433.) A deed conveys only such rights as the grantor has at the time, and no covenants are implied. (1 R. S., 739, § 143; id., 738, § 140; *O'Neil v. Whitaker*, 1 De G. & S., 83; *Hawkins v. Jackson*, 2 McN. & S., 372; *Burwell v. Jackson*, 9 N. Y., 540; *Thorp v. Keokuk Coal*

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*Co.*, 48 id., 253, 256; *Burk v. Walker*, 3 Barb. Ch., 438; 1 Sugd. on Vendors [8th Am. ed.], 510 [337]; 2 Dart on Vendors [4th Eng. ed.], 711.) No warranty is implied in a deed by a guardian. (Rorer on Judicial Sales, 167, § 458.) The maxim *caveat emptor* applies to purchasers at judicial sales. (Rorer on Judicial Sales, 168, §§ 459, 462.) If the court made a mistake as to the interest of Mary E. Jackson the suitor must pay for it. (*Raynor v. Selmes*, 52 N. Y., 580; *Cazet v. Hubbell*, 3 Tr. App., 333.) In the absence of fraud or legal mistake the purchaser can have no relief. (*Maynard v. Moseley*, 3 Swanst., 651.)

*S. V. R. Cooper* for the respondent. No covenants are implied in the deed from the guardian. (1 R. S., 738, § 140; *Thorp v. Keokuk Coal Co.*, 48 N. Y., 256; *Thomas v. Powell*, 2 Cox Eq. Cas., 394; *Abbott v. Allen*, 2 J. Ch., 519.) A court of equity has the power and will relieve a purchaser in case of mistake, fraud or misrepresentation, or of a mutual mistake of fact whether there are covenants in the deed or not. (*Denston v. Morris*, 2 Ed. Ch., 37; *Bingham v. Bingham*, 1 Ves., 126; *Belts' Supt.*, 1 Ves., Sr., 78; *Gillespie v. Moore*, 2 J. Ch., 585; *Caverly v. Williams*, 1 Ves. Jr., 210; *Northrop v. Graves*, 19 Conn., 548; *McNaughton v. Partidge*, 11 Ohio, 223; *Gratz v. Redd*, H. B. Mon. [Ken.], 190; *Edwards v. McLeay*, Cooper's Eq., 308; 1 Story's Eq. Jur. [8th ed.], §§ 140, 147, 193, 194; *Church v. Steele*, 2 N. Y. Wk. Dig., 52; 2 Sugd. on Vendors [8th Am. ed.], 197, 552.) The purchaser was entitled to compensation out of the purchase-money. (*Cann v. Cann*, 3 Sem., 447; Story's Eq. Jur., §§ 193, 142; *Denston v. Morris*, 2 Ed. Ch., 37; *Cooper v. Cooper*, 4 Irish Ch., 75.)

FOLGER, J. We are of the opinion that the order of the General Term should be affirmed.

This was an application to sell the real estate of Mary E. Jackson, an infant, in pursuance of the statute. (2 R. S., p. 194, § 170.) John Townshend, Esq., was therein appointed

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guardian of the infant, in relation to the proceedings on the application (id., § 171), and he has continued such ever since. Such a guardian is subject to the direction of any court having authority, in the paying over, investing and accounting for, all moneys that shall be received by him, and must observe the orders and directions of the court in relation to the trust (id., § 172); and he must give bond to that effect. (Id., § 172.) Before a sale is made it must be ordered by the court. (Id., § 175.) The agreement for a sale must be reported and confirmed by the court, when a conveyance may be executed under the directions of the court. (Id., § 177.) From the time of the application to the court, the infant is to be considered a ward of the court, so far as relates to the property, its proceeds or income, and *secus*, remains such though afterwards married (*In re Whitaker*, 4 J. Ch., 378); and the court supervises the disposition of the proceeds of the property, and the investment of the surplus for the benefit of the infant, and requires periodical accounts from the guardian. (Id., § 179.) No sale gives the infant any other or greater interest or estate in the proceeds of the sale, than was had in the estate sold; and the proceeds are to be deemed real estate of the same nature as the property sold (id., § 180), until the infant attains majority. (*Forman v. Marsh*, 11 N. Y., 544.) We have given this synopsis of the statute, to show that the special guardian is an officer of the court, and that, until the infant arrives at majority, and until the purchase-money has been, in fact, paid over to the infant, and as long as it remains in the hands of the special guardian, the court has control over it, and control over all the proceedings in the application. Doubtless, a court of equity has control of the proceedings before it, in any matter, and may correct irregularities and rectify mistakes therein, at any reasonable time after they occur; and it seems, from the continuing authority given to the court in the matter of a sale of the real estate of an infant, that it has, in especial manner, supervision and control of the proceedings therein. Indeed, it is the court itself, through its officers, the special guardian and the referee,

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which is the actor between its ward the infant, and the purchaser. Surely, it is incidental to the jurisdiction of a court in any case once moved before it, and not yet passed from its control, to overhaul any of the proceedings for irregularity or for errors made by its officers, and by further order, to amend them, so as to protect a party likely innocently to suffer thereby. So, in *Davison v. De Forest* (3 Sand. Ch., 456, 499), where there was doubt whether purchasers at a sale of the real estate of four infants had got good title to the whole premises, and a part of the purchase-money remained in bond and mortgage to the clerk of the court, the court refused to order payment of the proceeds to the survivors of the four infants, unless they would execute conveyances of their title to the purchasers. It was there said: "If there be any room for doubt as to the conveyance having transmitted the title, which the court ordered and intended, it is due to the purchasers, upon the faith of the order of the court, to make suitable provision for the vesting of such title as may remain in any of the claimants of the fund, before permitting them to receive it. As the whole subject is peculiarly within the disposal of the court, provision should be made for the protection of the purchasers, against the doubt of their having acquired the whole estate in the lands sold. The proceedings show clearly, that the court aimed to vest them with the whole title."

There is no doubt here, but that the intention of the court was, to sell and convey an equal undivided half of the whole premises. It was the intention of the purchaser, to buy an interest to that extent. It was the belief of all concerned in the proceedings, at every stage of them, that the infant had good title to an equal undivided one-half part; and that by the order of the court, an interest to that extent would pass to the purchaser, by the conveyance ordered by the court and made by its officers. Nor is there any doubt but that in this, the court, and its officers and all concerned, were innocently in error. There did exist, a tenant in common of the lands, who owned an interest in the premises equal to that of the

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infant. This was a fact unknown, when the proceedings for a sale were pending, and until after the order of the court was made, approving of the conveyance to the purchaser. It was an important, relevant fact, which materially varied the case, and would, had it been known, have caused different action on the part of the court and the purchaser. It does not appear that it could, by proper diligence and inquiry, have been discovered by the purchaser sooner than it was. Upon an analogous case, in a contested suit, after a decree has been signed and enrolled, chancery allows the bringing of a bill of review, (*Goodhue v. Churchman*, 1 Barb. Ch., 596; *Hunt v. Smith*, 2 Rich. Eq., 465; *Wiser v. Blachly*, 2 J. Ch., 488); even after affirmance of the decree on appeal (*Barbor v. Searle*, 1 Vern., 416); and will grant relief by a reversal or modification of the former decree. And before final decree a similar practice was followed. (*Gardner v. Dering*, 2 Edw. Ch., 131; *Land v. Wickham*, 1 Paige, 256.) There is an analogy too in courts of law, though not so close, in cases in which a new trial is granted for newly-discovered evidence.

It would be manifest injustice in the case in hand to compel the purchaser to pay for a fictitious interest in land; and we are glad that we find power in the court to open its proceedings, and take proof of the newly-discovered important fact, and conform its order and conveyance, and the amount of the purchase-money, to the true state of the case. The mode in which this has been done in this case, seems to have saved the rights of all parties and to have wrought justice.

All concur.

Order affirmed.

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Statement of case.

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COSMORE G. BRUCE, Appellant, v. J. B. BURR et al.,  
Respondents.

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Under section 150 of the Code, a defendant may interpose as many defences or counter-claims as he may have, and an objection of inconsistency between them is not available.

In an action, therefore, for breach of a contract of sale, defendant may set up a rescission of the contract on the ground of fraud or mistake, and, also, breach of warranty on the part of plaintiff.

Defendants contracted to sell and deliver to plaintiff a quantity of books at stipulated prices, receiving in payment therefor the promissory note of L. Before and about the time of the delivery of the note, plaintiff stated to defendants that the note was good, and would be paid at maturity; that he would guarantee that the note would be paid, and that the maker was responsible. The note was not good, and was not paid at maturity, and the maker was not responsible. In an action for breach of the contract, in failing to deliver the books, it appeared that defendants made inquiries of others as to the responsibility of the maker, and received favorable answers, which they believed, and upon which they, to a certain extent, relied. Defendant B., who made the contract, testified that he relied upon plaintiff's statements. *Held*, that defendants' testimony was not contradicted by, or inconsistent with, the fact that he believed, from information derived from others, that the maker was responsible; that such belief would not prevent the enforcement of a warranty if made; and that the statements of the plaintiff constituted a warranty.

Also *held*, that such a parol warranty was not invalidated by the statute of frauds.

(Argued October 3, 1876; decided November 14, 1876.)

APPEAL from order of the General Term of the Court of Common Pleas, for the city and county of New York, reversing a judgment in favor of plaintiff, entered upon the report of a referee, and granting a new trial. (Reported below, 5 Daly, 510.)

This action was brought to recover damages for the alleged breach of a contract of sale on the part of the defendants.

The complaint alleged, and the referee found, in substance, that defendants contracted to sell and deliver to the plaintiff certain books and publications to the amount of \$2,975.50,



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and agreed to, and did, receive in payment therefor the promissory note of one O. F. Lund for that amount; that defendants delivered a portion of said books and publications in pursuance of the agreement, but refused to deliver the balance. The defendants, in their answer, claimed to rescind the contract on the ground of fraudulent representations on the part of the plaintiff, as to the solvency of the maker of the note. While the trial was pending before the referee, the defendants, upon motion, were granted permission to serve an amended answer, setting forth as an additional defence, and as a counter-claim, a breach of warranty, on the part of plaintiff, as to the goodness of the note and the responsibility of the maker. On the continuance of the hearing before the referee, plaintiff's counsel asked that defendants be compelled to elect between the defences of rescission and breach of warranty; which request was denied, and said counsel duly excepted.

The referee found, among other things, "that, prior to, and about the time of, the delivery of the note of O. F. Lund by the said plaintiff to the said defendants, the said plaintiff did state to the defendants that the said note was good, and would be paid at maturity; and that he would guarantee that the note would be paid, and that the maker was responsible; that the said note was not good, and was not paid at maturity; and the maker was not at the time of such statement responsible; that the defendants did not rely upon the statements and representation made by plaintiff to defendants in regard to the said note." And, as conclusion of law, the referee found that plaintiff was entitled to recover the damages proved.

Further facts appear in the opinion.

*Geo. W. Van Slyck* for the appellant. No representations of plaintiff were shown upon which an action would lie. (*Wakeman v. Dalley* 51 N. Y., 37; *Chester v. Comstock*, 40 id., 576; *Oberlander v. Speiss*, 45 id., 175; *Marsh v. Falker*, 40 id., 562.) Defendants, with an action against Lund on the note still pending, are in no condition to tender the note to

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plaintiff. (*Cobb v. Hatfield*, 46 N. Y., 533; *Curtiss v. Howell*, 39 id., 211.) The law presumes every man solvent until the contrary is shown. (*Walrod v. Bell*, 9 Barb., 271.) Defendants cannot avail themselves of the defence of warranty in this action. (*Kennedy v. Thorp*, 51 N. Y., 174; *Bk. of Beloit v. Beale*, 34 id., 473; *Rodermond v. Clark*, 46 id., 354; *Morris v. Reasford*, 18 id., 552; *Ross v. Mather*, 51 id., 108; *Springstead v. Lawson*, 23 How., 302.) There was no warranty of the note, except the implied one as to the title and its genuineness. (*Wilbur v. Cartright*, 44 Barb., 540; *Ender v. Scott*, 11 Ill., 35; *Humphry v. Curlew*, 8 Blackf., 508.) Defendants cannot avail themselves of the defence of the mutual mistake as to the solvency of the maker of the note at the time of transfer. (*Dudley v. Scranton*, 57 N. Y., 424; *Bliss v. Mather*, 51 id., 108; *Burnham v. Walker*, 54 id., 656; *Degravo v. Elmore*, 50 id., 1; *Barnes v. Quigley*, 59 id., 265; *Graham v. Read*, 57 id., 681; *Williams v. M. and T. F. Ins. Co.*, 54 id., 577; *Welch v. Moffat*, 1 T. & C., 575; *Kimberley v. Patchen*, 19 N. Y., 334; *Whitbeck v. Van Ness*, 11 J. R., 409.)

*Simon E. Church* for the respondents. The contract was illegally procured and void. (3 R. S. [5th ed.], 978, §§ 42, 43; id., 956, § 55; *Swords v. Owen*, 43 How., 176; *Best v. Bander*, 29 id., 489; *Hoyt v. Allen*, 2 Hill, 322; *Pennington v. Townsend*, 7 Wend., 276; *De Witt v. Brisbane*, 16 N. Y., 508; 2 Pet., 527; 20 How., 154; 26 Barb., 595; 17 id., 397; *Bell v. Quinn*, 2 Sand., 146; Story on Con., §§ 443, 447.) Independent of the statute, the contract was void for fraud. (Story's Eq., § 192; *Willink v. Vandever*, 1 Barb., 599; *Simar v. Canaday*, 53 N. Y., 306; *Mead v. Bunn*, 32 id., 275; *Bennett v. Judson*, id., 238; *Van Slyke v. Hyatt*, 46 id., 259; *Sharp v. Mayor, etc.*, 40 Barb., 256; *Craig v. Ward*, 1 Abb. Ct. App. Dec., 454; 3 Keyes, 387.) Plaintiff's representations on turning out the note constituted a warranty. (*Wilbur v. Cartright*, 44 Barb., 536; *Cook v. Nathan*, 16 id., 342; *Ross v. Mather*, 47 id., 582; 2 East, 234; *Brisbane v.*

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*Parsons*, 33 N. Y., 332; *Cardell v. McNeill*, 21 id., 336; *Throop on Validity of Collateral Verbal Agreements*, 63; *Yates v. Alden*, 41 Barb., 172; *Haight v. Hoyt*, 19 N. Y., 466; *Ballard v. Lockwood*, 1 Daly, 158.) The fact that the note was worthless when it was turned out and accepted in payment was alone sufficient to defeat this action. (*Benedict v. Field*, 16 N. Y., 595; *Roberts v. Fisher*, 43 id., 159.)

CHURCH, Ch. J. There is a legal difficulty, although somewhat technical, in sustaining the decision of the General Term in favor of the defendants on the ground of a right of rescission founded upon a mutual mistake within the principle decided in 16 New York, 595, and 43 id., 159. That defence was not set up in the answer. A right to rescind on the ground of fraud was set up, but not on the ground of mutual mistake. The evidence was competent upon the issue made, and the right to object to its use upon an issue not made by the pleadings was not, therefore, waived. (54 N. Y., 577.)

The General Term having reversed the judgment below upon the facts, this court has a right to review such decision, and for that purpose all the facts are before the court for consideration; and if the facts justify a reversal of the judgment, although upon a different theory from that adopted by the General Term, the decision of the latter should be sustained.

One of the defences set up in the amended answer by the special permission of the court was a parol warranty of the goodness of the note and of the solvency of the maker. An objection is made that this defence is not available because inconsistent with the defence of a right of rescission founded upon fraud or mistake. The proper mode of interposing this objection would have been by appealing from the order permitting the defence to be made. But the objection is not tenable. The Code (§ 150) allows a defendant to put in as many defences or counter-claims as he may have, and the objection of inconsistency between them is not available. The first question is whether this defence was established. The referee found upon sufficient evidence that prior to and

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about the time of the delivery of said note of O. F. Lund by the said plaintiff to the said defendants the said plaintiff did state to the defendants that the said note was good and would be paid at maturity, and that he would guaranty that the said note would be paid and that the maker was responsible. The referee also found that said note was not good and was not paid at maturity, and that the maker was not responsible; but the referee also found that the defendants did not rely upon these statements and representations, and upon this latter finding it is claimed that a defence cannot be predicated upon a warranty. This finding, in the light of the evidence, is a little ambiguous. Whether the learned referee intended by this finding to decide that the statements and representations of the plaintiff were not the sole inducement, or any inducement for taking the note and making the contract by the defendants, or that the statements were of such a character that the defendants had no right to rely upon them, except as expressions of opinion, cannot be certainly determined. The defendants did institute independent inquiries as to the responsibility of the maker and received information favorable to his solvency upon which, to a certain extent, they relied; but the defendant who transacted the business expressly affirms that he relied upon the statements of the plaintiff, and this is not contradicted and is not inconsistent with the fact that he believed that the maker was responsible from information derived from other persons. Such belief would not prevent the enforcement of a contract of guaranty or warranty, if made; certainly not if it had been in writing, and the same principle, in this respect, applies to a parol contract. The finding of the referee is explicit as to the language employed, and it is apt and proper to constitute a warranty, although no particular expression is necessary for that purpose. The language of the plaintiff, that he would guarantee that the note would be paid, is not appropriate as an expression of opinion, and all his statements, as found by the referee, were positive and unqualified in respect to the goodness of the note and the solvency of the maker. True, the

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plaintiff declined to indorse the note, but stated as a reason, according to the evidence of one of the defendants, that it was not necessary, as it was payable to the order of Lund, and he had indorsed it, but, at the same time, assured the defendant that the note was "perfectly good." In any aspect of this finding, whether considered as a question of fact or law, I do not think it should operate to preclude the defendants from enforcing the contract of warranty.

Upon the argument, my impression was that the statute of frauds was in the way of enforcing this parol warranty, but the case of *Cardell v. McNiel* (21 N. Y., 336) seems to be decisive in favor of the right to enforce it. The observation of Comstock, J., in delivering the opinion, thus construes the transaction: "In a sense merely formal, he agreed to answer for the debt of Cardell. In reality, he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him, and thereby discharge him." I am unable to distinguish the two cases in principle, and we are disposed to adopt the decision as controlling in this case.

The order of the General Term must be affirmed, and judgment absolute ordered for the defendants, with costs.

All concur.

Order affirmed and judgment accordingly.

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IN THE MATTER OF THE ACQUISITION BY THE RHINEBECK AND CONNECTICUT RAILROAD COMPANY (Appellants) OF THE TITLE TO CERTAIN LANDS OWNED, ETC., BY ALIDA G. RADCLIFFE ET AL., Respondents.

After the confirmation of the report of commissioners of appraisal appointed in proceedings instituted by a railroad corporation under the general railroad act (chap. 140, Laws of 1850) to acquire lands for the purposes of its road, the corporation cannot, without leave of the court, abandon the proceedings and refuse to pay the award made to the owner. Upon confirmation of the report mutual rights become vested

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in the parties and the corporation cannot, of its own option, recede. The confirmation determines the rights of both parties subject only to the right of review as to the amount of appraisal.

It is not necessary, in order to conclude the corporation, that the title to the land should have vested in it under the proceedings. It is sufficient if the right to acquire it on payment of the award is fixed.

After confirmation of the report of commissioners of appraisal in such proceedings, and the making of an order as prescribed by said act (§ 17) as to payment of the award, the railroad company refused to file the papers or enter the order or to pay the award, a motion was made by the landowners to compel the filing of the papers and order, and for "other and further relief." The court made an order granting the specific relief asked in the notice of motion, and also directing the company to pay or deposit the amount of the award as directed in the order of confirmation, and in default thereof for ten days that a precept issue for its collection. *Held*, no error; that it was the right of the owner to have the papers filed, and that the awarding of a precept, in case of default, was authorized under the amendment of the general railroad act of 1854 (§ 5, chap. 282, Laws of 1854).

(Argued October 8, 1876; decided November 14, 1876.)

**APPEAL** from order of the General Term of the Supreme Court in the second judicial department, affirming an order of Special Term, requiring the Rhinebeck and Connecticut Railroad Company and their attorney to file in the office of the clerk of Dutchess county the petition and other papers and the order of the court confirming the report of commissioners to appraise the compensation to be paid to Alida G. Radcliffe and others, the owners of real estate sought to be condemned under the general railroad act for the purposes of said company. (Reported below, 8 Hun, 34.)

Proceedings were instituted by said corporation under said act in October, 1875. Commissioners of appraisal were appointed who duly made their report, and upon motion, on the part of the corporation, the report was confirmed and the amount awarded was directed to be paid to the owners or deposited in a bank designated, to the credit of their attorney. The papers and order were taken by the attorney of the corporation, who refused to file the same, and the corporation declined to pay the award. Upon affidavit showing these

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facts an order was granted requiring the corporation to show cause why the said papers should not be forthwith filed in the office of the clerk of the county of Dutchess, and why said owners "should not have such other or further relief in the premises as shall be just." The railroad company opposed upon affidavit stating, in substance, that prior to and on the day of the confirmation of the report, the attorney for the owners expressing himself dissatisfied with the award, the attorney for the corporation offered to stipulate that the award might be set aside and a new commission appointed; that the attorney for the owners desired ten days' time in which to consult and obtain consent of the owners, which was granted; that, thereupon, the order of confirmation was signed but not filed, and before the expiration of the ten days the attorney for the corporation notified the attorney for the owners that it had concluded that it would not require the land in question, and so had directed its attorney not to file the papers. The order directed the corporation and their attorney to forthwith file the papers, and directed the corporation to pay over or deposit the amount of the award as directed by the order of confirmation, and, in case of its omission so to do for ten days after service of the order, that a precept issue for the collection of the amount.

*Samuel Hand* for the appellant. The award was not filed or confirmed so as to give either party a vested right. (Laws 1850, chap. 140, § 18; *H. R. R. Co. v. Outwater*, 3 Sandf., 689.) The proceedings being incomplete the company had a right to abandon them. (*In re Wash. Park*, 56 N. Y., 144, 154.) An appeal may be taken to the General Term of the Supreme Court in any special proceedings. (Laws 1854, chap. 270, § 1; Code, § 11, sub. 3; *R. and S. R. Co. v. Davis*, 43 N. Y., 137, 147; *S., B. and N. Y. R. R. Co.*, 4 Hun, 311.)

*Frank Loomis* for the respondents. The order was not appealable to the Court of Appeals. (*N. Y. C. R. R. Co. v.*

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Opinion of the Court, per ANDREWS, J.

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*Marvin*, 11 N. Y., 277; *R. and S. R. R. Co. v. Davis*, 55 id., 145.) The order appealed from was rightfully made. (*People v. Cent. Bk.*, 53 Barb., 412; *In re S., B. and N. Y. R. R. Co.*, 4 Hun, 311; Laws 1854, chap. 282, §§ 5, 6; *In re N. Y. C. and H. R. R. R. Co.*, 60 N. Y., 116; *Neal v. P. and C. R. R. Co.*, 31 Penn., 19; *Davis v. N. P. R. R. Co.*, 2 Phila., 146.)

ANDREWS, J. The main question presented by this appeal is, whether after confirmation of the report of commissioners of appraisal, appointed in proceedings instituted by a railroad company, under the "act to authorize the formation of railroad corporations and to regulate the same," passed April 2, 1850, to acquire lands for the use of the road, the company may abandon the proceedings and refuse to pay the awards made to the owners, if for any reason it is not deemed for the interest of the corporation, or it elects not to complete the purchase.

In the *Matter of the Commissioners of Washington Park* (56 N. Y., 144), this court reaffirmed the doctrine of previous cases that proceedings taken by public officers or bodies for the condemnation of land for streets, or public parks under statutes authorizing the appropriation of private property for public use, on compensation being made to the owners, might, with consent of the court, be abandoned at any time before the confirmation of the report of the commissioners of appraisal. The decisions on the subject were referred to and considered in the opinion of RAPALLO, J., and he stated it to be the established doctrine, that in "street cases the corporation may be permitted to discontinue proceedings at any time before rights resulting therefrom have become vested in the property owners," and that "no such rights are vested, until the report of the commissioners is finally confirmed, and there is a final award in the nature of a judgment in favor of the property owners, for their compensation."

In none of the cases referred to in the opinion was the



precise question presented, whether proceedings could be abandoned after confirmation of the report of the commissioners of appraisal, the question in all of them being whether before that time they could be discontinued without the consent of the property owners. But it was assumed by the court in nearly all the cases that upon confirmation of the report, rights become vested in the parties respectively, and that the corporation could not thereafter recede and abandon the proceedings.

The provisions of the various statutes, considered in the cases, are by no means uniform. In some of them, as in the statute of 1813, relating to the city of New York, the corporation becomes seized of the land on confirmation of the report of the commissioners of estimate and assessment, while in others, as in the statute relating to the village of Brooklyn (chapter 155, Laws of 1827), after confirmation of the report payments is required to be made before the corporation became vested with the title or the right of possession of the lands mentioned in the report.

The statute last mentioned was under consideration in *The People v. Corporation of Brooklyn* (1 Wend., 318), and in *Martin v. Mayor, etc.* (1 Hill, 545), and in both cases, although it was not the precise point in judgment, the opinion of the court clearly was that the confirmation of the report was the point, where the discretion of the corporation to abandon the proceedings ended. The cases of *Stafford v. The Mayor, etc., of Albany* (6 J. R., 1; S. C., 7 id., 541) and *Hawkins v. The Trustees of Rochester* (1 Wend, 54) support the same conclusion.

The test of the right of a corporation, in street cases, to discontinue at any particular stage of the proceedings is, we think, under the decisions, whether "they have progressed so far as to give mutual rights to the parties." (SAVAGE, C. J., in *People v. Corporation of Brooklyn*, 1 Wend., 325.) If they have been carried to the point where the public has acquired a right to the land, and the landowner a right to the compensation awarded, the corporation cannot recede.

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It is not necessary, in order to conclude the corporation, that the title to the land should have become vested in it under the proceedings. It is sufficient if the right to acquire it, on payment of the award, is fixed, and the duty of the corporation to pay the award is absolute. By the seventeenth section of the general railroad act, the application to confirm the report of the commissioners is to be made by the company upon notice to the parties to be affected by the proceedings, "and the court," the statute declares, "shall thereupon make an order, containing a recital of the substance of the proceedings in the matter of the appraisal, and a description of the real estate appraised, for which compensation is to be made; and shall also direct to whom the money is to be paid, or in what bank, and in what manner, it shall be deposited by the company." The eighteenth section provides that a certified copy of the order shall be recorded in the county in which the land described in it is situated, and that "thereupon, and on the payment or deposit by the company of the sums to be paid as compensation for the land, etc., the company shall be entitled to enter upon, take possession of, and use the said land for the purposes of the incorporation during the continuance of its corporate existence, etc.; and all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company." Notwithstanding the imperative language of the seventeenth section, that the company "shall give notice" of the confirmation of the report, these words have, in similar statutes, been construed as permissive merely. (*Martin v. Mayor, etc.*, 1 Hill, 545.)

The company, when the report of the commissioners is made, is apprised of the sum which it will be required to pay for the lands embraced in the report, and if the valuation is, in the judgment of the company, excessive, or if, for any reason, it is regarded for the interest of the corporation not to proceed further, it may decline to do so; but if the company elect to go on and apply for and procure a confirmation of the report, the relation of vendor and vendee is then estab-

lished between the parties, and the company is bound to pay the awards, or such sum as may be awarded on a second appraisal, if, on appeal by either party, as provided for in the eighteenth section, a new appraisal shall be directed. The statute does not, in express terms, impose upon the company the duty to pay the awards after confirmation of the report of the commissioners. But the court "shall," the statute declares, "direct to whom the money is to be paid," etc. It assumes that the awards are to be paid by the company to the persons, or in the manner designated in the order of the court, and the duty of the company to pay them is, we think, clearly implied. The provisions in the eighteenth section, that if, on a second appeal, the awards are increased, the difference "shall be a lien on the land appraised," and if diminished "the difference shall be refunded to the company," tend to support the conclusion that the confirmation of the first report, determines the rights of both parties, subject only to the right of review, as to the amount of the appraisal.

In this case the Rhinebeck and Connecticut Railroad Company took proceedings under the statute to acquire the lands of the respondents. Commissioners of appraisal were appointed, who made their report, and the company thereupon, upon notice, moved for its confirmation. The court, on the 18th of December, 1875, granted the motion, and made the order required by the seventeenth section of the act, which order directed, among other things, that the sum awarded to the respondents should be paid to them, or deposited in the First National Bank of Rhinebeck to the credit of their attorney. The order was not entered, and the papers on which it was granted were not filed. The company retained them, and refused to enter the order or file the papers, or to pay or deposit the amount of the award. This motion was made to compel the company to file the papers and order, and for other and further relief.

The court, after hearing the parties, made an order granting the specific relief asked in the notice of motion, and also

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directing the company to pay to the respondents the amount of the award, or deposit it as directed in the order of confirmation, and in default thereof for ten days after service of the order, that a precept issue for its collection. The confirmation of the report of the commissioners of appraisal in proceedings to acquire lands by a railroad company under the general railroad act, within the principle established in the street cases referred to, creates reciprocal rights between the company and the landowners, and puts it beyond the power of the company thereafter to abandon the proceedings. The order of confirmation operates as a judgment binding both parties.

It was the right of the respondents to have the order of confirmation, and the papers upon which it was granted, filed in the proper clerk's office. The company had no exclusive right to them. The order was the evidence of the decision of the court, and with the papers upon which it was granted, should have been filed with the clerk who is the custodian of its records.

That part of the order which directs the respondent to file the report and papers, and the order of confirmation was clearly right, and we think, also, that the awarding of a precept to collect the award of the commissioners in default of the respondents' paying or depositing the same as required by the order of confirmation, was authorized under the amendment of 1854. (Laws of 1854, chap. 282; *Matter of the N. Y. C. and H. R. R. Co.*, 60 N. Y., 116.) The facts stated in the affidavits presented in opposition to the motion, do not show that the proceedings were abandoned by mutual consent of the parties. The attorney for the company before the order of confirmation was made, consented to give the attorney for the landowners, ten days time to consult with and obtain their consent to have the award vacated. But the attorney did not postpone the application for the order of confirmation, but procured it to be signed, and put the company in a position to enforce its claim to the land.

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It is unnecessary to consider whether the court could, upon application, set aside the order and relieve the company. No such application has been made, and the question is not now before us.

The order should be affirmed with costs, without prejudice to the company to move the court for leave to abandon the proceedings, or as it may be advised.

All concur.

Ordered accordingly.

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JAMES W. LYON, as Guardian, etc., v. JAMES W. LYON et al.

A general guardian, having in his hands moneys belonging to his ward, executed, individually, to himself, as guardian, a bond and mortgage for the amount. He sold the mortgaged premises, subject to the mortgage, and subsequently brought this action to foreclose the mortgage, making himself, individually, and the owner of the equity of redemption parties defendant. A judgment of foreclosure and sale was perfected and the premises sold. On motion of the purchaser to be discharged from his purchase, *held*, that the parties were estopped by the judgment from questioning the validity of the mortgage; that, as between the guardian and ward, the court would regard it as a valid security against the guardian, and, so long as the money was realized, the ward had no ground of complaint; and that, therefore, so far as the mortgage was concerned, no difficulty existed as to conferring a good title.

Certain judgment creditors of the owner of the equity of redemption were not made parties originally. After entry of judgment, upon written consent of the attorneys for said creditors, it was ordered that all the papers and proceedings be amended, *nunc pro tunc*, by adding their names, and that they be bound by the proceedings. *Held*, that it was incumbent upon plaintiff to establish, unequivocally, the authority of the attorneys to enter into the stipulation; that without such authority the judgment creditors were not bound; and, in the absence of proof thereof, the purchaser could not be compelled to take the title.

(Argued October 8, 1876; decided November 14, 1876.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department reversing an order of

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Special Term which discharged Horatio K. Wilcox, a purchaser under a decree of foreclosure and sale herein, from his purchase, and from liability thereon, because of defect of title; and directing said purchaser to complete his purchase.

In January, 1869, the plaintiff herein, who was the guardian of Matilda Lotten, an infant, had in his hands, as said guardian, \$4,000 belonging to his ward. He made and executed, individually, to himself, as guardian, a bond conditioned to pay that sum, and a mortgage upon certain premises owned by him, to secure the same. He subsequently sold and conveyed the premises, subject to the mortgage, to Rena Nelson, who sold and conveyed the same, also subject to the mortgage, to Welcome B. Beebe. This action was brought to foreclose said mortgage. Plaintiff himself, and the subsequent purchasers being made parties defendant. None of the defendants appeared, and judgment was perfected November 26, 1873. It was afterwards discovered that there were various judgment creditors of said Beebe, whose judgments were liens on the mortgaged premises, who were not made parties. The attorneys on the records, for the judgment creditors, signed a stipulation consenting that the summons, pleadings, papers and proceedings in the action be amended, *nunc pro tunc*, as of the day they were respectively had and filed, by adding the names of said judgment creditors as defendants, waiving service of papers and time allowed to answer or demur, and stipulating that their respective clients should be bound thereby, without prejudice to proceedings already had. Upon filing the stipulation, and on June 12, 1874, an order was entered thereon in conformity with its terms, and further ordering that the order be annexed to and made part of the judgment; the said attorneys also appearing and consenting thereto. The premises were sold, and bid off by said Horatio K. Wilcox.

*Edward H. Hobbs* for the appellant. The mortgage itself was invalid, and so was any title derived through it. (1 Story's Eq. Jur., § 317; 1 Powell on Mort., 286; *Ackerman v. Emott*, 4 Barb., 626; Perry on Trusts, §§ 194-209, 602.) The decree

of foreclosure was invalid, because the judgment creditors of the holder of the fee were not made parties before final judgment. (*Jackson v. Bartlett*, 8 J. R., 361; *Lusk v. Hastings*, 1 Hill, 656; *Walradt v. Maynard*, 3 Barb., 584; *Edwds. on Parties*, 88; *Curtis v. Hitchcock*, 10 Paige, 399.) Plaintiff could not, as a trustee, maintain an action against himself. (*Hill on Trustees*, 273; 1 Story's Eq. Jur., § 679; 1 Parsons on Con. [6th ed.], 164, 253; *Englis v. Furness*, 4 E. D. S., 599; *Parson on Part.* [2d ed.], 302; *Boylan v. McAvoy*, 29 How., 278.) If the title coming through the foreclosure was defective, the purchaser, unless he had full notice, could not be compelled to take it. (*Jackson v. Edwards*, 22 Wend., 498; *Mer. Bk. v. Thompson*, 55 N. Y., 11.)

*D. P. Barnard* for the respondent.

MILLER, J. Upon this appeal it is not material to consider the question whether the mortgage executed by the plaintiff to himself, as guardian, was a valid security for money belonging to the infant's estate. It is sufficient that as between the guardian and the infant a court of equity would regard it as a valid security against the guardian and give full effect to it for the purpose of protecting the interest of the ward. The plaintiff clearly could not object in an action which he had instituted, and the original defendants not having interposed any objection in the foreclosure suit, are estopped from questioning the validity of the judgment, and are bound by the same. As to the infant, so long as the money is accounted for or realized under the decree of foreclosure, there can be no ground of complaint. The judgment being valid between the original parties, no difficulty exists as to conferring a good title, so far as they are concerned.

A more serious question arises in regard to the lien of the judgment creditors who were not made parties in the first instance, and we think that such creditors having been omitted as such parties before final judgment was entered, it does not sufficiently appear that there has been an abso-

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lute waiver of their respective liens. The judgment was entered long before there was any appearance on their behalf by attorneys, and the consent of the attorneys to the amendment of the proceedings *nunc pro tunc*, and a waiver of the irregularity after judgment, does not of itself establish authority for such a purpose. It does not appear in the stipulation or any of the appeal papers that such authority actually existed, and after a judgment has been entered and before the legal effect of the notice of *lis pendens* and other proceedings can be changed by consent of the attorneys, there should be affirmative proof of the power of the attorneys to enter into the stipulation, and that they had full and ample authority to act in the premises. The party seeking to enforce the sale under a decree of foreclosure under such circumstances, should establish, unequivocally, the right of the attorneys not only to appear but to execute the proper stipulation on behalf of the judgment creditors, which they claim to represent. A different rule might lead to embarrassment and subject the purchaser to the hazard of a litigation, and perhaps to serious loss. In this respect he should be fully protected, and, as the case stands, was not compelled to take the title offered to him.

The order of the General Term must be reversed and that of the Special Term affirmed, with costs.

All concur; EARL, J., in result.

Ordered accordingly.

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GARRET L. SCHUYLER et al., Respondents, v. JOHN N. HAYWARD, Appellant, PATRICK H. POWER et al., Respondents.

The provision of the mechanic's lien law for the city of New York of 1863 (§ 14, chap. 500, Laws of 1863), declaring that for the purposes of the act one who has sold lands "upon an executory contract of purchase contingent upon the erection of buildings thereon shall be deemed the owner, and the vendee the contractor" does not change the actual relation between the vendor and vendee, or vary their legal rights as to each other, or to third persons, except for the purposes of the lien authorized by it.



## Statement of case.

Defendant H. contracted to sell defendant B. certain premises, and to advance to him \$9,000 to complete some unfinished houses thereon. B. agreed to finish the houses on or before May 1, 1873, and to give his bonds with mortgages on the premises for the purchase-price, with interest to date to May 1, 1873. The houses were not finished until July, 1874. H. acquiesced in the completion of the work after the time had expired. After their completion no deed was tendered or bonds and mortgages given, but H. took possession of, and rented the buildings. In an action to foreclose mechanics' liens filed by sub-contractors H. claimed to recoup damages sustained because of the delay in completing the buildings. *Held*, that H. was not entitled, by way of damages, to the rental value of the premises for the time between that fixed for the completion of the buildings and the time of their actual completion, as H. was not entitled under the contract to the rents and profits or to the use and occupation of the premises; that the fact that he did receive the rents after the buildings were completed was immaterial, as he did not receive them under the contract; that H. was not entitled to be allowed interest on the purchase-money, as whatever interest he was entitled to by virtue of his contract he was still entitled to from B., and to the security by mortgage for its payment; and, in the absence of proof of special damage, that the lienors were entitled to judgment for the balance unpaid by H. to B. under their contract at the time of filing the liens.

(Argued October 4, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York affirming a judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought to foreclose a mechanic's lien upon certain premises in the city of New York, the legal title to which was in defendant Hayward.

By agreement in writing dated March 4, 1873, Hayward agreed to sell and convey to defendant Leonard Buck, Jr., three unfinished buildings with the lots situate on the west side of Madison avenue for the sum of \$15,800 each, and to advance said Buck \$9,000 to complete said buildings in ten payments at various stages of the work. Buck agreed to give his bond and mortgage on each house for \$15,800, with the usual insurance and interest clause, the interest on said mortgages to date from May 1, 1873. No time was specified in the contract when the bonds and mortgages were to be given. Buck also agreed to

## Statement of case.

finish the buildings by May 1, 1873. The buildings were not finished until July 1, 1874, the deeds were never demanded from or tendered by Hayward to Buck, and the bonds and mortgages were never demanded from nor tendered by Buck to Hayward. Hayward took possession and rented said three buildings to tenants on May 1, 1874, Buck occupying one of them. Hayward continued to make payments of installments to Buck under their contract after May 1, 1873, and up to September 4, 1873, to the aggregate amount of \$6,400. The sub-contractors under Buck filed their liens respectively on September 4, 1873, and November 13, 1873, for work done and materials furnished between March 9, 1873, and the date of filing their respective liens. The referee found \$2,600 due from Hayward to Buck under their contract, with interest, and gave judgment against him as owner, in pursuance of the act of 1863, chapter 500, section 14, personally, up to said amount and interest, \$2,784, in favor of the sub-contractors, and directed a sale of the premises to satisfy the liens to that amount. The owner, Hayward, in his answer, set up a breach of his contract by Buck, and claimed to be entitled to set off against the balance unpaid by him on said contract, the damage he has sustained by the failure of Buck to complete the houses at the stipulated time.

Further facts appear in the opinion.

*Samuel Hand* for the appellant. The appellant is the owner of the premises, and the true measure of his damage is the value of their use during the period he was deprived of the use of them. (*Mushlett v. Silverman*, 50 N. Y., 362; *Doughty v. Devlin*, 1 E. D. S., 625; *Goudier v. Thorp*, id., 697; *O'Donnell v. Rosenberg*, 14 Abb. [N. S.], 59; *Ruff v. Rinaldo*, 50 N. Y., 664.) The sub-contractors could only recover to the extent the contractor could, were there no sub-contractors. (*Doughty v. Devlin*, 1 E. D. S., 625; *Ferguson v. Burke*, 4 id., 699; *Carman v. McInerow*, 13 N. Y., 70.)

*Thomas Hooker* and *F. G. Smedley* for the respondents. It was unnecessary to prove delivery or tender of the bonds

## Opinion of the Court, per ALLEN, J.

and mortgages. (*Redfield v. II. P. Ins. Co.*, 56 N. Y., 358; *Justh v. Nat. Bk. of Comm.*, id., 485; *Colwell v. Lawrence*, 38 id., 71; *McCabe v. Brayton*, id., 196; *Tipton v. Feitner*, 20 id., 432; *McMahon v. N. Y. and E. R. R. Co.*, id., 468; *Dillon v. Masterson*, 7 J. & S., 135; *Beekman F. Ins. Co. v. First M. E. Ch.*, 18 How. Pr., 436; *Hard v. Seeley*, 47 Barb., 428; *McCullough v. Cox*, 6 id., 387; *Pearsoll v. Fraser*, 14 id., 564; *Pordage v. Cole*, 1 Wm. Saund., 319; 1 Chitty's Pldgs., 323; 2 Pars. on Con. [5th ed.], 531; *Boone v. Eyre*, 1 H. Bl., 273, note a; *Duke of Albans v. Shire*, id., 279; *Bennett v. Pisley*, 7 J. R., 249; *Smith v. Betts*, 16 How. Pr., 251; *Tompkins v. Elliott*, 5 Wend., 497; *Gould v. Banks*, 8 id., 566; *Campbell v. Jones*, 6 T. R., 570; *Laird v. Smith*, 44 N. Y., 618; *Dowdney v. McCullom*, 59 id., 373; *Stevenson v. Pratt*, 3 J. & S., 496.) The owner cannot claim that the contractor perfected his rights under the contract by reason of non-completion on May 1, 1873. (*Dillon v. Masterson*, 7 J. & S., 135; *Ruff v. Rinaldo*, 55 N. Y., 664; *Gallagher v. Nichols*, 60 id., 448; *Smith v. Gurgerty*, 4 Barb., 614; *Sinclair v. Tallmadge*, 35 id., 602.) No damage was sustained by the appellant. (*Rogers v. Wheeler*, 52 N. Y., 262; *Casler v. Shipman*, 35 id., 542; *Van Slyke v. Hyatt*, 46 id., 259; *Lefler v. Field*, 47 id., 408; *Morgan v. Mulligan*, 50 id., 665; *Smith v. G. F. Ins. Co.*, 62 id., 85; *Hulce v. Sherman*, 13 How., 411; *Sharp v. Wright*, 35 Barb., 236; *Taylor v. Guest*, 58 N. Y., 265; *Fabbri v. Kalbfleisch*, 52 id., 28; *Stewart v. Smith*, 14 Abb., 75; *Hubbell v. Meigs*, 50 N. Y., 482; *Chubbock v. Vernam*, 42 id., 435; *Smith v. Coe*, 29 id., 666; *Laird v. Smith*, 44 id., 618; *Timney v. Ashley*, 15 Pick., 546; *Walrad v. Ball*, 9 Barb., 271; *Fox v. Harding*, 7 Cush., 522; 2 Greenl. Ev. [9th ed.], 293, note 6; *Hoyt v. Miner*, 7 Hill, 526; *Devlin v. Mack*, 2 Daly, 100; *Jenks v. Brown*, 4 Hun, 128.)

ALLEN, J. The statute (chapter 500, of the Laws of 1863, section 14) declares that for the purposes of the act, any person who may have sold or disposed of lands upon an

executory contract of purchase contingent upon the erection of buildings thereon, shall be deemed the owner, and the vendee the contractor, and subjects the owner in all respects to the provisions of the act. The law does not assume to change the actual relation of vendor and vendee, or vary their legal rights as between themselves or in respect to third persons, except for the purposes of the lien authorized by it. The entire effect of the provision is to give to laborers and material-men a lien for work performed and materials furnished toward the erection of buildings upon the lands, as if the vendor were the absolute owner, and the purchaser had contracted with him to erect the buildings. The same result is accomplished in other statutes by giving a lien wherever buildings are erected upon lands with the consent of the owner. The appellant Hayward was the legal owner, that is, the legal title of the lands was in him at the time of the erection of the buildings, but the title was held in trust for Burke, who was the equitable owner, subject to the performance of the contract of purchase by him. The contract has never been abandoned or rescinded, and the purchaser is now entitled to a specific performance of it. The appellant does not allege a failure to perform the contract by Burke, and a consequent forfeiture of all rights under the contract, either to the premises or to the advances in money agreed to be made. On the contrary, Hayward himself testified that he acquiesced in the completion of the buildings and made payments to Burke under the contract as late as July, 1874, long after the lien of the respondents attached, and fifteen months after the day named for the completion of the buildings, and the referee has found, at the request of Hayward, that the contract continued in force after the 1st day of May, 1873, and the work on said buildings was thereafter proceeded with by Burke with his assent. The relation of vendor and vendee was therefore continued and the contract was in force as an executory contract of sale until the completion of the buildings and the right of the purchaser to the last of the payments to be made by the owner was perfect. The only

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Opinion of the Court, per ALLEN, J.

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defence urged to the claims and liens of the respondents is by way of recoupment for damages sustained by reason of the delay in completing the buildings. It is urged that the respondents can, as lienors, under the statute, have no other or greater claim than could be enforced at the suit of Burke, and that whatever would constitute a defence in whole or in part in action by Burke, is competent as against the present claimants. Whether this be so in respect to a claim for unliquidated damages for mere delay in the performance of a contract acquiesced in by the owner need not be considered. The answer of the appellant is very general as to the damages which he claims to recoup. He does not aver any special damages, but merely that by reason of the failure of the contractor and purchaser to finish the buildings by the time limited he had sustained damages to the amount of \$3,900. Upon the trial, the appellant proved, under objections, the rental value of the premises from the time the houses were to have been completed, and also, the interest which would have accrued upon the mortgage had it been given pursuant to contract.

No claim was made by the appellant for the allowance of interest by way of damages, and, therefore, the claim as shadowed forth in the evidence and by the finding by the referee of the amount as requested must be considered as abandoned. The referee was only asked to find that the appellant sustained damages by reason of the delay in the completion of the buildings, to the amount of the value of the use thereof. The referee was unquestionably right in declining to give to the appellant the value of the use or the rental value of the premises for the interval of time between that fixed by contract for their completion, and the time of their actual completion. Had he been the actual instead of the merely theoretical owner for the purposes of the statute, the claim might have been proper. In such case, that might have been his actual loss, but not so under the circumstances developed here. The houses when completed were not to be for the use and occupation of Hayward, but of his vendee, Burke. The latter

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Opinion of the Court, per ALLEN, J.

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was entitled to the rents and profits unless he forfeited his right by some default, and the contract had been rescinded for that reason. The time of the completion of the buildings was not of the essence of the contract, and if it was the vendor did not avail himself of this failure to perform at the day, but suffered the purchaser to perform it at a later day, and the rights of the parties to the contract were the same as if the performance had been to the letter as to time and manner. Hayward was not, by the terms of the contract, entitled, either to the rents and profits of the premises or to their use and occupation. That he now receives the rents of some of the houses proves nothing, for the reason, that he does not receive them pursuant to the contract of sale, but under some new arrangement which cannot affect the lien of the respondents. Had the referee been requested to allow the interest upon the purchase-price from the time the mortgage was to bear interest by way of damages, he would have been compelled to rule adversely to the claim. The appellant has not lost his interest; whatever interest he is entitled to in virtue of his contract of sale, he is still entitled to demand and have of Burke, and to security upon the premises by mortgage, for its payment. For aught that appears, Burke is entirely solvent and able and ready to pay on request, and is prepared to give a mortgage according to the terms of the agreement, which will be ample security for the full amount of principal and interest due the appellant. There has been no default on the part of Burke to give the mortgage, for he has not been requested to do so, and should he make default he will forfeit his rights under the contract and the appellant will have the benefit of the work and materials of the respondent, and all that he contemplated receiving for his advances in the contingency of Burke's failure to perform upon his part. If any interest could be allowed it would only be the interest upon the interest, the payment of which has been deferred. But no claim was made of this and no question in respect to it is before us. The appellant could have had his mortgage and a specific performance of his con-

## Statement of case

tract with Burke had he claimed it, and the respondents have lost no right merely because the appellant has not insisted upon a literal performance.

The judgment must be affirmed.

All concur.

Judgment affirmed.

WILLIAM G. CUMMINS, Appellant, v. THE AGRICULTURAL  
INSURANCE COMPANY, Respondent.

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A policy of insurance issued by defendant upon plaintiff's dwelling-house contained a provision that if the dwelling-house "become vacated by the removal of the owner or occupant," the policy would be void, etc. In an action upon the policy, plaintiff's evidence tended to show that the occupant and his wife absented themselves from the house for a considerable period, but for a temporary and special purpose, he retaining it as his residence, and intending to return to it, leaving his furniture and family clothing therein, his wife taking care of it, going to it every week to cleanse it, and, from time to time, for other purposes. *Held*, that the provision referred to a permanent removal, an entire abandonment of the house as a place of residence; and that a refusal of the court to submit to the jury the question whether the house had been vacated by the removal of the occupant was error.

*Paine v. The Agricultural Insurance Company* (5 T. & C., 619), *Weston v. City Insurance Company* (15 Wis., 188), *Harrison v. City Insurance Company* (9 Allen, 231), *Keith v. Quincy Insurance Company* (10 id., 228) distinguished.

Also *held*, that a statement in the proof of loss that the premises were vacant did not preclude plaintiff from showing the circumstances under which the house had been vacated.

*Cummins v. Agricultural Insurance Company* (5 Hun, 554) reversed.

(Argued October 5, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order denying motion for a new trial, and directing judgment on an order nonsuiting plaintiff on trial. (Mem. of decision below, 5 Hun, 554.)

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Statement of case.

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This action was upon a policy of insurance issued by defendant, insuring, among other things, plaintiff's dwelling-house.

The policy contained this provision: "If the dwelling-house or houses hereby insured become vacated by the removal of the owner or occupant, or be unoccupied at the time of effecting the insurance, and not so stated in the application, then, and in every such case, and in either of said events, this policy shall be null and void, until the written consent of the company, at the home office, is obtained."

The house was occupied, at the time of the issuing of the policy, by Albert Cummins and wife, plaintiff residing in another house near by. Some three months prior to the fire, plaintiff went from home, leaving his wife, and his son and wife, at his request, stayed at his residence during his absence. Plaintiff's evidence was to the effect that Albert still retained the house as his residence; left there his furniture and family clothing, and intended to return to it upon the return of his father. Albert and his wife were frequently at the house, the latter going there each week to sweep it, air the furniture, and, at other times, to can fruit, to obtain articles needed, and for other purposes. Before the return of the plaintiff, and while Albert was thus absent, the house was burned. In the proofs of loss, plaintiff stated that the premises were vacant at the time of the fire. At the close of the evidence, defendant's counsel moved for a nonsuit, upon the ground that the undisputed evidence showed that the house became vacant, and continued so up to the fire, without notice to defendant.

Plaintiff's counsel asked the court to submit the question to the jury whether the occupant of the house vacated the same by removal. The court refused so to do, and granted the motion for a nonsuit, to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard in first instance at General Term.

*Geo. B. Bradley* for the appellant. The house did not become vacated by the removal of the occupant. (6 J. & S.,



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Opinion of the Court, per RAPALLO, J.

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517; *Rann v. Home Ins. Co.*, 59 N. Y., 387; *Hoffman v. Etna Ins. Co.*, 32 id., 405; *Reynolds v. Com. Ins. Co.*, 47 id., 597; *Hynds v. Schen. Co. Ins. Co.*, 11 id., 554; *Com. Ins. Co. v. Robinson*, 64 Ill., 265; 5 Am. R., 557; 2 Burr. L. Dict., Removal; *Crawford v. Wilson*, 4 Barb., 518; *O'Brien v. Com. F. Ins. Co.*, 6 J. & S., 517.) The paper of September eighteenth was in no sense an estoppel. (*McMaster v. Pres't, etc., of Ins. Co.*, 55 N. Y., 222.)

*Bradley Winslow* for the respondent. The refusal to allow plaintiff to show that his statement of loss was different from that contained in the proofs of loss was correct. (*Irving v. Excel. F. Ins. Co.*, 1 Bos., 507.) The house was vacated within the spirit and meaning of the policy. (*Weston v. City F. Ins. Co.*, 19 Wis., 138; *Harrison v. City F. Ins. Co.*, 9 Allen, 231; *Keith v. Q. M. F. Ins. Co.*, 10 id., 228; *Paine v. Ag. Ins. Co.*, 5 N. Y. S. C. R., 619.)

RAPALLO, J. At the General Term this case was decided mainly upon the authority of the case of *Paine v. The Same Defendant* (5 N. Y. Sup. Ct. [T. & C.], 619). The policy in that case contained a provision that should the house insured be *left unoccupied* without giving *immediate* notice to the company the policy should be void. The occupants, being husband and wife, separated and left the house uninhabited for several weeks, though their household effects were left upon the premises and the husband occasionally went there. The Supreme Court held that the house was left unoccupied within the meaning of the policy. After that decision it appears that the defendant changed the form of its policies, and in the one now in question in place of the provision that leaving the house unoccupied should avoid the policy, inserted the clause that if the house should *become vacated by the removal of the owner or occupant* the policy should be void, etc. The court below expressed the opinion that there was not, in effect, any substantial distinction between the language used in this policy and that used in the policy in the *Paine*

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Opinion of the Court, per RAPALLO, J.

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case, or such as would allow the court to depart from its decision in that case.

The question is not free from difficulty, but it seems to us that there is a material distinction between the two provisions. In the case of *Paine* the mere fact that the house was left unoccupied was sufficient to avoid the policy, according to its express terms, unless *immediate* notice were given. In the cases of *Weston v. City Fire Insurance Company* (15 Wis., 138) and *Harrison v. Same Company* (9 Allen, 231), which are relied upon as authorities in the *Paine* case, the clause was that the policy should become void if the occupant personally vacated the premises without giving immediate notice; and in the case of *Keith v. Quincy Mutual Fire Insurance Company* (10 Allen, 228) the clause was that the policy should become void if the building remained unoccupied over thirty days without notice. In all these cases it was immaterial how the house came to be vacated or unoccupied. The fact alone was sufficient. But in the present case merely vacating the house or leaving it unoccupied was not declared in the policy to be sufficient to terminate the insurance. The condition was superadded that it must have been vacated *by the removal of the owner or occupant*. Some significance must be attached to these words, and we think that they refer to a permanent removal and entire abandonment of the house as a place of residence. So long as the occupant retained it as his place of abode, intending to return to it, and left his furniture and effects there, some degree of watchfulness and care on his part might reasonably be expected. He would continue to have an interest in its protection and preservation, and in common parlance he would not be said to have removed therefrom.

The absence of Albert Cummins and his wife, though for a considerable period, was temporary in its nature and for a special purpose. There was evidence that he still retained the house as his residence and left his furniture and clothing of his family there; that during this absence his wife took care of the house, going there every week to cleanse it, and

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Statement of case.

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from time to time to obtain articles required for immediate use and for other purposes, and that it was their intention to return as soon as the plaintiff had finished his canvassing trip. The statement in the proofs of loss as to the premises being vacant did not preclude the plaintiff from showing at the trial the circumstances under which the house had been vacated (55 N. Y., 229), and we think the court should have submitted to the jury, as requested, whether it had been vacated by the removal of the occupant therefrom.

The judgment should be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

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BENJAMIN ESTES, Respondent, v. RUTH D. WILCOX, Appellant.

A creditor at large cannot maintain an action to enforce a resulting trust, under the statute of uses and trusts (1 R. S., 728, § 52), in lands purchased and paid for by his debtor, and by direction of the debtor deeded to another; and this is so, although the debtor is dead, and died insolvent. These facts do not dispense with the general rule that a debt must be ascertained by judgment, and legal remedies exhausted, before the creditor can proceed in equity to collect it out of assets liable in equity for its payment.

(Argued October 5, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order affirming an order of Special Term, which overruled a demurrer to the complaint herein.

The complaint alleged, in substance, that Joshua Whipple, in his lifetime, caused certain real estate, specified and described in the complaint, which had been purchased and paid for by him, to be conveyed to defendant, Ruth D. Wilcox, which real estate Whipple improved at his own expense, and at great cost, and occupied up to the time of his death, said conveyance being so made and accepted for the purpose

## Statement of case.

of hindering, delaying and defrauding the creditors of said Whipple; that Whipple died, in March, 1873, intestate and insolvent, leaving a large amount of indebtedness, his assets being sufficient to pay only about forty per cent. of his debts; that, at the time of said conveyance, said Whipple was indebted to plaintiff in the sum of \$253.77, and to Mary H. Estes in the sum of \$142, and was so indebted at the time of his death, the items of which indebtedness were specifically set forth in the complaint; that said Mary H. Estes duly assigned her claim to plaintiff; plaintiff asked that said conveyance be declared fraudulent and void as against plaintiff, and that the balance of his claim over and above the forty per cent., with interest thereon, be charged upon said real estate, and that said premises, etc., be sold to pay the same.

Defendant demurred on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action.

*S. B. McIntyre* for the appellant. Plaintiff's right as a creditor must be established by a judgment before he can have any standing in court to question the disposition of the property. (2 R. S., 174, 180 [Edm. ed.], § 38; *id.*, 728, §§ 51, 52, p. 677; *Dunlevy v. Talmadge*, 32 N. Y., 457; *Reubens v. Joel*, 3 Kern., 488; *Cramer v. Blood*, 57 Barb., 164; *Ocean Nat. Bk. v. Olcott*, 46 N. Y., 12; *Allyn v. Thurston*, 53 *id.*, 622; *Wiggins v. Armstrong*, 2 J. Ch., 144, 283; *Brinkerhoff v. Brown*, 4 *id.*, 671; *Beck v. Burdell*, 1 Paige, 305.)

*Wm. H. Smith* for the respondent. It was not necessary for plaintiff to show a recovery of a judgment and a return of execution *nulla bona*. (*Sharpe v. Freeman*, 45 N. Y., 802; *Loomis v. Tift*, 16 Barb., 545; *Spicer v. Ayers*, 2 T. & C., 626.) Plaintiff's only remedy is in equity to establish the trust. (*Brewster v. Power*, 10 Paige, 562; *Garfield v. Hatmaker*, 15 N. Y., 475; *McCartney v. Bostwick*, 32 *id.*, 53.) Plaintiff held the note as assignee of the creditor at the time of the conveyance. (*Smith v. Storr*, 4 Hun, 123; *Craig v. Parkes*, 40 N. Y., 181.)

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Opinion of the Court, per ANDREWS, J.

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ANDREWS, J. The question presented by the demurrer in this case, was decided adversely to the plaintiff in *Allyn v. Thurston* (53 N. Y., 622). It was there held that a creditor at large could not maintain an action to enforce a resulting trust in lands purchased and paid for by his debtor, and by his direction conveyed to another person. In that case the action was brought after the death of the debtor, and it was averred in the complaint that he died insolvent, and unable to pay his debts. The defendant, by his demurrer, admitted the existence of the debt, and the insolvency and death of the debtor, but the court were of opinion that this did not dispense with the general rule requiring that the debt must be ascertained by judgment, and that legal remedies must be exhausted before the creditor could proceed in equity for the collection of the debt out of assets liable in equity for its payment.

The reason of the rule, that the creditor's debt must be ascertained by judgment, before proceeding in equity, does not fail by the death of the debtor before judgment recovered for the debt. The creditor may prosecute the claim to judgment against the personal representatives of the debtor, and although it would not be conclusive against his heirs or his grantees, by title acquired before his death, or in this case against the defendants, it would conclude the creditor as to the amount of his debt.

In a suit against the personal representatives of the debtor to recover it, any defence which the debtor himself could have made, could be interposed, and the claims would be subject to set-off, or to the plea of the statute of limitations, or to any defence existing when the action was brought. These questions would be settled as between the creditor and the estate by a judgment in the creditor's action against the representatives. It is convenient and reasonable to require this to be done before subjecting third persons to litigation with the plaintiff, who may never be able to establish any claim against the estate. It is sufficient, however, to say that the case of *Allyn v. Thurston* (*supra*) is decisive of this.

The allegation that the intestate's estate only amounted to

## Statement of case.

forty per cent. of his debts, is no stronger than the allegation of insolvency in the case referred to, and the averment of the existence of the debt, although admitted by the demurrer, does not give jurisdiction to a court of equity to proceed to subject the property in question to the operation of the alleged trust.

The judgment of the General Term should be reversed, and judgment for defendant ordered on the demurrer.

All concur.

Judgment accordingly.

HENRY JUTTE, Appellant, v. WILLIAM J. HUGHES,  
Respondent.

67	267
108	412

Plaintiff's complaint alleged, in substance, that by reason of the failure of defendant to keep the privies and drains upon his premises in proper repair the water and filth therefrom was caused to overflow upon plaintiff's premises adjoining and into the cellars of his houses, rendering them unfit for use, interfering with the use of the premises and with the letting thereof and injuring the walls, etc. Upon the trial of the action plaintiff offered evidence to show that he had lost rents in consequence of the flow of the water into his cellars, that the cellars had remained unoccupied since the water came in, and also proof of the rental value of the premises. This was objected to generally and excluded. The court also, in its charge, excluded the rental value of the premises as an element of damages. *Held*, error; that the damages thus sought to be proved, being such as necessarily and naturally resulted from the injury complained of, a special averment thereof in the complaint was not necessary in order to authorize a recovery.

Also, *held*, that the allegations in the complaint were sufficient to authorize evidence of the loss of the use of the cellars and of the rental thereof, treating it as special damage particularly as there was no objection on the ground of the insufficiency of the averments.

The court confined the damages to the injuries done to the walls and cellars. It appeared that plaintiff incurred expenses in plumbing and fixing the sewers, and that other expenses would be required to prevent further injury from the flow of the water; also, that injuries were sustained because of the stench. *Held*, error; that these were proper items of damage.

The proof showed that defendant had paved his yard and conducted from

## Statement of case.

the roofs of his houses, in leaders and drains to the privies, an unusual quantity of water beyond the capacity of the drains to carry away. The court charged that if the water did issue from the defendant's yard and he did every thing possible under the circumstances and practicable in the way of drainage to carry it off from the premises he was not liable. *Held*, error; that if defendant suffered the water improperly to accumulate on his premises so as to flow upon the plaintiff, it did not relieve him from liability that he did all he reasonably could do to carry it off.

Also, *held*, that the errors specified were not cured by a verdict for defendant; as it could not be assumed that the result would not have been changed had proper instructions been given on the question of damages. *Jutte v. Hughes* (8 J. & S., 126) reversed.

(Argued October 5, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendant entered upon a verdict. (Reported below, 8 J. & S., 126.)

This action was brought to recover damages for injuries alleged to have been occasioned to plaintiff's premises, in the city of New York, by the flow of water and filth from defendant's premises adjoining. The allegations in the complaint as to the cause of the injuries and the damages sustained are as follows:

"That since about the 1st day of March, 1870, the defendant has failed to keep the privies, drains and drain pipes connected with his said building in proper repair, and has suffered the same to become and remain out of order so that water and filth escaped therefrom and percolated through the wall of the plaintiff's said house and into the cellar thereof in such quantities as to soak and cover the floor of such cellar and to render the same permanently unfit for use, and also to greatly injure the walls and other portions of the said plaintiff's building and to create such an offensive stench and smell as to interfere with the plaintiff's use of said premises and with the letting thereof, and that the plaintiff has, in consequence thereof, sustained damage in the sum of \$850."

"That this plaintiff having requested said defendant to take

## Statement of case.

up said drain and abate such nuisance was notified by him that he could enter upon his said premises and take up the same and that he, said defendant, would pay the expense; that this plaintiff thereupon, in pursuance of such direction, caused the drain in said defendant's yard, from which said nuisance proceeded, to be taken up and repaired so as to stop the flow of water and filth therefrom, and expended in so doing the sum of seventy-five dollars, no part of which has been paid." "That by reason of the flowing of such water and filth into the cellar of his said premises, as aforesaid, this plaintiff was compelled at various times to clean out the sewers and drains leading therefrom and to expend in so doing the sum of seventy-five dollars."

By stipulation between the parties the only question to be raised upon appeal were upon exceptions to the rulings of the court in excluding certain evidence upon the question of damages and upon exceptions to the charge of the court.

The facts in reference to these questions are sufficiently set forth in the opinion.

*George W. Wingate* for the appellant. It was error to exclude evidence of the loss of the use of the cellars by plaintiff in consequence of the overflow, and of their rental value. (*McKeon v. Lee*, 4 Robt., 450; *St. John v. Mayor, etc.*, 6 Duer, 315; *Scott v. Bay*, 3 Ind., 431; *Cincinnati v. Evans*, 5 Ohio, 394; *De Wint v. Wilts*, 9 Wend., 325; *Phillips v. Higgins*, Alb. L. J., Aug., 1874, p. 123.) It was not necessary for the complaint to aver any special damage upon this point. (*Vanderslice v. Newton*, 4 N. Y., 132; *St. John v. Mayor, etc.*, 6 Duer, 315, 320.) Proof as to the rental value of the premises was admissible. (*Griffin v. Culver*, 16 N. Y., 496, 942; *Francois v. Schoellkopf*, 53 id., 154.) Plaintiff was entitled to a new trial. (*Wardell v. Hughes*, 3 Wend., 418; *Gillett v. Spear*, 7 id., 193; *Clark v. Vorce*, 19 id., 232; *Underhill v. N. Y. and H. R. R. Co.*, 21 Barb., 489; *Myers v. Malcom*, 7 Hill, 292; *Williams v. Fitch*, 18 N. Y., 546; *Jaeger v. Kelly*, 7 Rob., 586; *Lagre v. Townsend*, 15



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Opinion of the Court, per MILLER, J.

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Wend., 647; *Howell v. Hughes*, 3 id., 418; *Highland Bk. v. Wynkoop*, H. & D. Sup., 243.) It was error for the court to charge that if the water did not come from defendant's yard he was not responsible if he had done every thing possible and practicable in the way of drainage to carry it off. (*Bellows v. Sackett*, 14 Barb., 96; *Bentley v. Armstrong*, 8 W. & S., 40; *Foot v. Bronson*, 4 Lans., 51; *Wheatly v. Baugh*, 25 Penn., 528; *Broadbent v. Ramsbotham*, 11 Exch., 662; *Ranston v. Taylor*, id., 369.)

*Warren G. Brown* for the respondent. The judge was correct in his charge in limiting the jury in estimating damages to those to plaintiff's wall, cellar and building. (1 Hall Supr. C. R., 412; *Malony v. Dows*, 15 How. Pr., 261; *Hallock*, 2 Barb., 630; 14 Wend., 159; 12 id., 64; 1 Chit. Pl., 371; Sedg. on Dam., 67; 36 N. Y. Supr. C. R., 185.) The loss of rent was too remote to justify its use as an item of damage. (*Crain v. Petrie*, 6 Hill, 522; *Stapenhorst v. Am. Mfg. Co.*, 36 N. Y. Supr. C. R., 392; *Mercy v. Met. G. L. Co.*, 38 id., 185.)

MILLER, J. Upon the trial of this action, evidence was offered to establish that the plaintiff had lost tenants on account of the water flowing into the plaintiff's cellars and that the cellars had remained unoccupied since the water came in, which testimony was excluded by the court. Proof of the rental value for the purpose of showing the damages done, was also rejected. The questions put in reference to these subjects were objected to generally, and no special ground of objection was stated to the form of any of them. The judge in his charge to the jury also excluded the rental value as an element of damage. To each of these rulings exceptions were taken and they uphold the principle that no damages could be recovered for the loss of rent, or the loss of the use of the cellars, and they may be considered under the same general head. I think that the judge was clearly wrong in the decisions referred to. The complaint was for

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Opinion of the Court, per MILLER, J.

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damages by reason of the failure of the defendant to keep the privies and drains of his buildings in proper repair, thereby causing the water and filth to escape into plaintiff's houses and cellars and rendering the cellars unfit for use, and, among other things, creating such an offensive smell as to interfere with the use of the premises and the letting of the same. The admissibility of evidence of this character in a proper case, is abundantly established by authority. In *Francis v. Schoellkopf* (53 N. Y., 152), which was an action to recover damages for maintaining a nuisance, it was held that the proper measure of damages was the difference between the rental value, free from the effects of the nuisance for which damages were claimed and subject to it. (See also, *McKeon v. See*, 4 Robt., 450; *St. John v. The Mayor*, 6 Duer, 315; *Ruff v. Rinaldo*, 55 N. Y., 664; *De Wint v. Wiltsie*, 9 Wend., 325.) No valid reason exists why the same rule should not prevail in a case like the present one, where it is quite apparent that damages of the same character may follow, as the immediate consequence of the alleged injury. It is said, however, that the evidence was improper, because special damages should have been alleged in order to be proved, and that the complaint should have stated the names of the tenants, the apartments and specific amounts of rent alleged to have been lost, so as to enable the defendant to meet the proof which might establish such an allegation. This doctrine might well apply in actions of slander, and of a kindred class under the common-law practice, which requires that special damages should be specifically alleged. Where, however, the damages necessarily result and naturally flow from the injury complained of, they may be recovered without any special averment. (*Vander slice v. Newton*, 4 Comst., 132.) This would seem to follow here. But, be that as it may, the complaint having alleged that the use of the cellars and the letting thereof was prevented by the unlawful act of the defendant, it was quite sufficient to authorize the admission of the evidence. Especially is this the case, as there was no objection to the evidence upon the ground stated, and if this had been interposed, it could have

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been obviated by an amendment of the complaint. The cases cited to sustain the proposition that the loss of rent is too remote as an item of damages, are clearly distinguishable, and, as this case stands, have no application. The reasons stated are also applicable to the portions of the charge already referred to.

A portion of the charge of the judge, to which exception was taken, was also erroneous in confining the damages to mere injuries done to the walls and cellars, for the reason that it is made to appear that expenses had been incurred by the plaintiff in plumbing and fixing the sewers, and that other expenses would be required in preventing further injury from the flow of the water through the walls, which should have been taken into consideration. There was also error in the charge in limiting the damages without allowing for the injuries which were caused by the stench and smell which necessarily would seriously affect the use of the property and constitute an important item of the damages incurred.

There was also error in that portion of the charge of the judge to the effect, that if the water did come from the defendant's yard and he did every thing which was possible, under the circumstances, and practicable in the way of drainage to carry it off from the premises, he was not liable. The proof showed that the defendant had paved the yard, thus causing the water to accumulate and render the yard less penetrable to the same, and conducted from the roofs of his houses to the privy in leaders and drains an unusual quantity of water beyond the capacity of the drains to carry away. This he had no right to do, and he was bound to take care of such water as fell and accumulated upon his own premises and to prevent its causing any injury to the property of the plaintiff. (*Bellows v. Sackett*, 15 Barb., 96; *Foot v. Bronson*, 4 Lans., 51.) It matters not that the defendant did all that he reasonably could do to take the water off, if he suffered it improperly to increase on his own premises, and so as to flow on the plaintiff's premises. The principle established by the familiar maxim *sic utere tuo ut alienum non laedas*, is applicable to such a case as is pre-

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sented by the evidence here. It may be invoked in all cases where the owner of land allows water to flow from his own premises to that of his neighbor's and causes damages; where a man digs on his own land so near to his neighbor as to cause the land of the latter to fall upon his, and he thus transfers a portion of the soil of another to his own. (*Farrand v. Marshall*, 21 Barb., 409.) Also, where an injury is caused by the blasting of rocks on the land of the owner, which fall on the land of his neighbor (*Hay v. The Cohoes Co.*, 2 Comst., 159), as well as in other cases of a similar character. For the same reason where, by an imperfect system of drainage, or a failure to keep drains in proper repair, water is diverted and an injury committed, the law holds the delinquent amenable. The exception to the portion of the charge last considered was accompanied with a request to charge that the defendant was bound absolutely to carry off the surface water from his premises, which request was refused, the court holding substantially as charged, and no exception appears to have been taken to the refusal to charge. I think the exception raises the question as to the correctness of the charge as made, and hence is a proper subject for consideration upon this appeal. It by no means follows that because the jury brought in a verdict for the defendant that the defendant was not responsible for the loss of rent. Nor is it to be assumed that the result would not have been changed had the judge given proper instructions on the subject of damages and the extent of the defendant's liability.

For the errors discussed the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur; ALLEN and FOLGER, JJ., on the ground of the exclusion of evidence; ANDREWS, J., in result.

Judgment reversed.

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GEORGE BENNETT et al., Administrators, etc., Respondents,  
v. THE LYCOMING COUNTY MUTUAL INSURANCE COMPANY,  
Appellant.

A policy of fire insurance contained a provision that in case of loss the insured should "forthwith give notice" thereof to the secretary of the company, and within thirty days thereafter deliver to the secretary a particular account thereof. Some two months after it was issued, the insured delivered the policy to an agent of the company for the purpose of having its consent to an alteration in the property insured indorsed thereon. The agent forwarded it to the company, which retained and canceled it; of this the insured had no notice. The property was destroyed January twentieth, the local agents of the company were notified in a day or two, and the general agent shortly after. The insured had no knowledge that any further notice was necessary. On February fifteenth, they called at the office of the company and procured a blank policy, thus learning for the first time what notice was required; this they immediately gave, and furnished proofs of loss February nineteenth. In an action upon the policy, *held*, that the word "forthwith" did not mean immediately or instantaneously, but within a reasonable time, or with reasonable diligence, dependent upon the circumstances of the case; that, under the circumstances, the notice given was within reasonable time, and so "forthwith" within the meaning of the policy; and that the proofs of loss were furnished within the prescribed time.

The trial court held, as matter of law, that notice was not given within a reasonable time, but left it to the jury to find whether there had been a waiver of notice. The only fact upon which a waiver could be predicated was, that when notice of loss was given to the secretary, he claimed the company had no risk upon the property, and did not raise the question that the notice was too late. *Held*, error; that the facts did not show a waiver; but that, as the notice was given in accordance with the requirements of the policy, defendant was not harmed by the rulings of the court; and so the error was not ground for reversal.

(Argued October 5, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon a verdict.

This was an action upon a policy of fire insurance issued by defendants to Oakley, Clapp & Co., upon property at

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Opinion of the Court, per EARL, J.

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Horseheads, New York. After loss, the claim was assigned to plaintiff's intestate.

The facts pertinent to the questions discussed appear sufficiently in the opinion.

*J. McGuire* for the appellant. The judge erred in submitting the question of waiver to the jury. (*Underwood v. Farmers', etc., Ins. Co.*, 57 N. Y., 500; *May on Ins.*, 618, 621; *Sec. Ins. Co. v. Jay*, 22 Mich., 467; *Patrick v. Farmers' Ins. Co.*, 48 N. H., 621; *St. L. Ins. Co. v. Kyle*, 11 Mo., 278.) It was no part of the secretary's business to waive the condition, and his action or silence, when the notice was handed to him, could not bind the company. (*Fay v. Noble*, 12 Cush., 1, 11; *Lester v. Webb*, 1 Al., 84.)

*W. L. Dailey* for the respondents. Defendant, as matter of law, waived payment of premium. (32 N. Y., 622; 35 id., 133; 55 Barb., 473; 57 id., 521; *Sheldon v. F. and M. Ins. Co.*, 26 N. Y., 464.) "Notice of loss forthwith" means reasonable notice under all the circumstances, and the notice given was such. (*Roumage v. Mech. Ins. Co.*, 1 Green [N. J.], 110; *N. Y. C. Ins. Co. v. Nat. Pro. Ins. Co.*, 20 Barb., 475; *Clark v. N. E. Ins. Co.*, 6 Cush., 43, 445; *Taylor v. Mer. Ins. Co.*, 57 Barb., 518; 56 N. Y., 565; *Dohn v. Mer. Ins. Co.*, 5 Lans., 277; *Post v. Aetna Ins. Co.*, 43 Barb., 451; *Underwood v. F. J. S. Ins. Co.*, 57 N. Y., 500; *Bumpstead v. Mut. Div. Ins. Co.*, 12 id., 81; *Inland Ins. and Dep. Co. v. Stauffer*, 83 Penn. St., 397; *West Branch Ins. Co. v. Hilfesstein*, 40 id., 289.)

EARL, J. The policy contained conditions that in case of loss the insured shall forthwith give notice thereof to the secretary of the company, and within thirty days after the loss shall also deliver to the secretary a particular account of the loss. It is claimed on the part of the defendant that neither of these conditions was complied with.

The defendant was a Pennsylvania company, and in 1869

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Opinion of the Court, per EARL, J.

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Strand & Brown were its local agents at Montrose in that State. They gave Nichols, who did business at Elmira, in this State, authority to receive applications for insurance for them, and for that purpose furnished him with blank applications. Oakley, Clapp & Co., to whose rights plaintiffs have succeeded, delivered their application for insurance to Nichols, and he forwarded it to Strand & Brown, and they forwarded it to the company. It then issued the policy and sent it to Strand & Brown, and they delivered it to Nichols, and he to the insured, Oakley, Clapp & Co. The policy took effect April first. They retained the policy until June, when desiring to make some alterations in the insured property, they made application to Nichols for the consent of the company, and delivered to him their policy to have the consent indorsed thereon. The policy was forwarded to the company, and it retained the policy and canceled it. The insured several times applied to Nichols for the policy and it was not returned to them, and they had no notice that it had been canceled. On the 20th of January, 1870, the property was destroyed by fire. Shortly before the fire, Baldwin & Wells had been appointed local agents of the defendant near the property insured, and the insured gave them notice of the fire in a day or two after its occurrence and the general agent of the company, who received information of the fire, shortly thereafter visited the location of the insured property and had an interview with one of the insured about the loss. The insured, not having possession of the policy, had no knowledge that any other or further notice was necessary, and first learned that they were required to give the notice to the secretary of the defendant on the fifteenth of February after the fire. They then called at the office of the company and asked to see the policy which had been issued to them, and being refused, they asked for a blank policy like the one which had been issued, and that being furnished, they first learned that the notice was required to be given to the secretary, and they immediately gave it. This notice was given on the twenty-sixth day after the fire; and the question is, whether,

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under all the circumstances, it was given "forthwith," within the meaning of the policy. The word "forthwith" does not here mean immediately or instantaneously after the fire. It means, and has been held to mean, within a reasonable time or with reasonable diligence after the fire. (*N. Y. Gen. Ins. Co. v. Nat. Protection Ins. Co.*, 20 Barb., 468; *Inman v. Western Fire Ins. Co.*, 12 Wend., 452.) What is a reasonable time depends upon all the circumstances of the case. Here the notice having been given to the defendant's agents and no suggestion made by them that any other notice was required, and the general agent and adjuster of the defendant also having had notice of the fire, and having visited the locality and conversed with one of the insured about the loss, the insured had no reason to suppose that any other notice was necessary; and the policy being, without their fault, out of their possession, they did not know what it required. Hence the giving of the notice to the secretary as soon as they learned, by the exercise of reasonable diligence, that it was necessary, was, under the circumstances of this case, within a reasonable time, forthwith, within the meaning of the policy.

It is true that the judge at the Circuit held, as matter of law, that the notice had not been served within a reasonable time, and left it to the jury to find that the notice had been waived. The only facts of which a waiver could be predicated are that when the notice of loss was given to the secretary on the twenty-sixth day after the fire, he claimed that the company had no risk upon the property destroyed and did not take the ground that the notice was too late. These facts do not show a waiver of notice. The secretary, believing that the policy had been properly canceled and that the risk had been thus terminated, took that ground and said nothing about any other. No other ground of defence was waived. The insured were not misled. If the notice, when served, was too late, there was no way in which they could remedy it. The sole question was whether the notice was served in a reasonable time, and the facts being undisputed, that was a question of law which the judge should have determined in favor of



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the plaintiff. (*Roth v. The Buffalo and State Line R. R. Co.*, 34 N. Y., 548; *Hedge v. The Hudson River R. R. Co.*, 49 id., 223; *Witbeck v. Holland*, 45 id., 13.) No harm, therefore, was done to the defendant by the disposition of this question of notice at the Circuit.

The proofs of loss were furnished to the company on the thirtieth day after the fire. The fire occurred on the twentieth day of January and the proofs were furnished on the nineteenth day of February, and, hence, the claim that they were not furnished in time is unfounded.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

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JOHN PENNIE, Jr., Appellant, v. THE CONTINENTAL LIFE  
INSURANCE COMPANY, Respondent.

This action was upon an endowment policy for \$1,000. The answer admitted the liability and set up a counter-claim for loans amounting to \$204.41. The General Term allowed the counter-claim and gave judgment for the balance. *Held*, that the judgment was not appealable under the amendment of 1874, to section 11 of the Code (chap. 322, Laws of 1874), as the matter in controversy was not the judgment but the counter-claim, and so the amount in controversy was less than \$500.

(Argued October 3, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, in favor of plaintiff.

This action was upon an endowment policy issued by defendant in 1867, upon the life of plaintiff for \$1,000, payable in six years. The answer admitted the issuing of the policy, and set up as a counter-claim various loans made by defendant to the plaintiff upon the policy amounting to \$204.41, and alleged an offer to pay the balance. The court directed a verdict for the full amount of the policy with interest, amounting to \$1,083, and a verdict was rendered accordingly. Exceptions

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Opinion of the Court, per CHURCH, Ch. J.

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were ordered to be heard at first instance at General Term. The General Term ordered judgment for \$795.59, the amount of the policy less the counter-claim

*Samuel Hand* for the appellant.

*Lyman Tremain* for the respondent. The appeal will not lie because the subject-matter in controversy, exclusive of costs, is less than \$500. (Laws of 1874, chap. 322; 58 N. Y., 489; 2 N. Y. Weekly Dig., 151.)

CHURCH, Ch. J. A verdict was directed at the Circuit for \$1,083, and the defendant's exceptions ordered to be heard at General Term in the first instance. The General Term ordered judgment for the plaintiff for \$795.59, from which the plaintiff appealed to this court, and the question is, whether it is appealable under chapter 322 of the Laws of 1874. We think it is not. The object of the act was to limit appeals to amounts in controversy exceeding \$500. Although the judgment exceeded \$500, yet the sum in controversy, is considerably less than that amount. The only controversy in the case, is, whether the counter-claim of about \$200 should be allowed. Ordinarily the amount of the judgment is in controversy. In this case it is not. The amount of the judgment is not contested — the only contest is, whether the judgment should be increased about \$200.

The appeal must be dismissed.

All concur.

Appeal dismissed.

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Statement of case.

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ANN ELIZA MITCHELL, Executrix, etc., et al., Respondents,  
v. THE VERMONT COPPER MINING COMPANY et al., Appel-  
lants.

Plaintiffs' testator, M., was a stockholder in a Vermont mining corporation. Its directors imposed an assessment upon its stock and advertised the stock of M. for sale for non-payment thereof. Prior to the sale M. tendered to the president of the corporation, at its office, during business hours, his check for the amount of the assessment. The president refused to accept, but made no objection as to form or amount. The stock was sold and bought in by the president. M. repeatedly thereafter offered to the corporation and to its president the amount of the assessment and all charges and expenses in making the sale. In an action brought to set aside the sale and to restrain a transfer of the stock to the purchaser, *held*, that in the absence of evidence of want of authority in the president the tender must be assumed to have been properly made to him; that the question of want of authority not having been raised upon the trial, could not be raised upon appeal; that no objections as to the form or amount of the tender having been made at the time, they were waived and the tender must be held sufficient; that a sufficient tender having been made, the sale was without authority and void, and that plaintiff was entitled to the equitable relief claimed.

(Argued October 5, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiff, entered upon a decision of the court at a trial at Special Term. (Reported below, 8 J. & S., 406.)

This action was brought to set aside a sale at public auction made by the defendant, the Vermont Copper Mining Company, of 10,941 shares of the stock in the company belonging to plaintiffs' testator, and to restrain the company from transferring the stock to the purchaser.

The court found substantially the following facts, among others: That, on September 17, 1866, the plaintiffs' testator, Samuel L. Mitchell, owned 10,941 shares of the stock of the defendant, the Vermont Copper Mining Company, a corporation organized under the laws of the State of Vermont, having power, by virtue of the act under which it was incorporated, to

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assess its stock, and to sell the shares of stockholders not paying assessments made pursuant to its by-laws; that, by various resolutions of the board of directors of said corporation, made pursuant to its by-laws, an assessment upon its stock of twenty cents per share was made, and the stock upon which such assessment had not been paid was directed to be sold at public auction; that, pursuant to such resolutions, the stock of said Mitchell was advertised for sale; that, prior to the sale, he caused to be tendered to Smith Ely, the president, and a director of said company, at its office, during business hours, a check for the amount of said assessment upon his stock; that the company had requested payment by check; that said Ely declined to receive the same, making no objection to the check, but saying that it would affect the sale to have such stock withdrawn; that he would buy in the stock and Mitchell could then pay the assessment. The stock was sold as advertised, and bid off by Ely, Mitchell publicly protesting against the sale at the time. He did not pay for the same, however, and had not done so to the time of trial.

It appeared, upon the trial, that Mitchell repeatedly tendered to the company and to Ely the amount of the assessment, and the charges and expenses of the sale, but they refused to accept the same. The court directed judgment vacating and annulling the sale, and enjoining the company and Ely from taking any proceedings to consummate the same. Judgment was entered accordingly.

*Moses Ely* for the appellants. The alleged tender by plaintiff's testator was at law a nullity. (*F. L. and T. Co. v. Mann*, 4 Robt., 356-366; *Crumph v. U. S. Mining Co.*, 7 Grat., 352-371; *Dougherty v. Hunter*, 54 Penn., 380; *Chicago, B. and Q. R. R. Co. v. Coleman*, 18 Ill., 297; *Leggatt v. N. J. M. and B. Co.*, Saxton's Ch., 542-553; *N. C. R. R. Co. v. Baspian*, 15 N. Y., 494.)

*Jno. E. Parsons* for the respondents. If, prior to the sale of the stock, the assessment was tendered, the power of the

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company to sell it was terminated. (*Hull v. Peters*, 7 Barb., 331; *Carman v. Pultz*, 21 N. Y., 547; *Duffy v. O'Donovan*, 46 id., 225; *Kortright v. Cady*, 21 id., 342; *Walton v. Smith*, 5 B. & Ald., 439; *Kemble v. Wallis*, 10 Wend., 374; *Haskins v. Kelly*, 1 Robt., 160.) Defendant's president was authorized to receive the tender. (*Dezell v. Odell*, 3 Hill, 215; *Plumb v. Cat. Co. Mut. Ins. Co.*, 18 N. Y., 392; *Moore v. Mut. Nat. Bk.*, 55 id., 41; *Barnard v. Campbell*, id., 456; *Chapman v. Rose*, 56 id., 137; *Howland v. Myer*, 3 Cow., 290; *Conover v. Mut. Ins. Co.*, 3 Den., 254; *Bk. of Vergennes v. Warren*, 7 Hill, 91; *Hoag v. Dart*, 60 N. Y., 96.)

ALLEN, J. In the absence of evidence of want of authority in the president to represent and act for the corporation defendant, or any claim upon the trial that he did not represent the corporation, the tender to him of the assessment at the office of the company during business hours must be assumed to have been properly made to him, and his refusal to accept it must be regarded as the act of the corporation. (*Plumb v. Cattaraugus Co. Mutual Ins. Co.*, 18 N. Y. 392; *Dougherty v. Hunter*, 54 Penn. St. R., 380; *Howland v. Myer*, 3 Comst. 290; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Conover v. Mutual Ins. Co. of Albany*, 3 Den., 254; *Commercial Bank of Buffalo v. Kortright*, 22 Wend., 348.) If the defendant intended to challenge the authority of the president to represent and act for the corporation, the question should have been made upon the trial, when it might have been obviated by other evidence. There was no objection to the tender at the time it was made, either as to form or amount, and all objections which might have been taken upon either ground were therefore waived, and the tender must be held to have been sufficient in amount and in proper form. The check of the party not objected to was, for all the purposes of a legal tender, the equivalent of money. (*Duffy v. O'Donovan*, 46 N. Y., 223.) A sufficient tender of the amount due for the assessments having been made before the sale, the sale was without legal authority and void.

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It is now claimed that this is not a case for equitable relief. But the claim is untenable. The testator before the commencement of the action repeatedly offered to the corporation and to Mr. Ely, its president, who was also the purchaser of the stock, the amount of the assessments, and all charges and expenses in making the sale, and the same was refused. By this action the refusal of the parties to recognize the rights of the stockholders, and the assertion of title under color of a sale, gave the party a right of action against the wrongdoers. With this adverse claim his stock had no marketable value, and he was in effect ousted from all the rights of a stockholder. The right to relief is unquestionable.

The court below was not asked to provide in its judgment for a payment of the assessments as a condition of relief, and no error can be alleged in this court by reason of an omission to do so.

The costs were in the discretion of the court below.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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DENNIS MAHER, Respondent, v. THE HIBERNIA INSURANCE COMPANY, Appellant.

Where the complaint in an action upon a policy of fire insurance, sets forth facts showing that the parties were mistaken as to the effect of the language used, the averments are sufficient to authorize a reformation of the contract, although there is no direct allegation of a mistake of fact.

Although a party insured accepts a policy with knowledge of the language used in describing the property insured, if, at the time, he points out a mistake therein, but is prevented from having the same corrected, or is thrown off his guard and dissuaded therefrom, by the acts or declarations of the insurer, he may show the mistake in an action on the policy; and the insurer is estopped from setting up the letter of the contract in bar of the action, and from claiming that the situation of the property does not agree therewith.

Where the parties to a contract, through a misconception as to the mean-

67	283
117	480
67	283
122	263
67	283
136	189

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ing and effect of terms when used in such a contract, use terms which, failing to express their intention, do express a meaning different from that intended, proof of the facts will make a case for a reformation of the contract; and this, although they knew what words were employed and their ordinary meaning.

A policy of fire insurance upon plaintiff's building, described it as "occupied as a dwelling." A portion of the lower story was occupied as a grocery, and the residue of the house as a dwelling. In an action upon the policy it was alleged, and evidence was given and received under objection on the trial, showing that plaintiff and the local agent of the insurer, who filled out and issued the policy, knew at the time how the house was occupied; that they both intended to insure it, as it was actually occupied, and both thought the terms used in the description in the policy would properly designate the occupation; that plaintiff, doubting whether the intention had been well carried out, called the attention of the agent to the erroneous description, and was assured by him that it made no difference, that the words used were apt and ample to express their meaning and intention; also, that the secretary and general agent of the insurer, with knowledge of the description in the policy, inspected [in person the property insured and pronounced the risk a good one. No express allegation of a mistake was contained in the complaint. *Held*, that the evidence was properly received and was sufficient to authorize a reformation of the contract, which was proper under the pleadings.

Also, *held*, that a reformation of the policy did not render nugatory, or affect the proofs of loss furnished.

The policy contained a condition that any fraud or "false swearing" would forfeit all claims under it. Plaintiff, in his proofs of loss, stated under oath that the building was occupied as a dwelling-house, and for no other purpose. *Held*, that the term "false swearing" meant a verified false assertion fitted and likely to, or which does deceive; and that as defendant, through its agents and secretary knew the facts, and as the words used, when charged with the meaning given to them by the parties, were not untrue, as between them, there was no breach of the condition.

The judgment was simply for the amount of loss, without, in express terms adjudicating a reformation of the policy. *Held*, immaterial.

(Argued October 6, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict and affirming an order denying a motion for a new trial. (Reported below, 6 Hun, 358.)

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Statement of case.

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This action was upon a policy of fire insurance issued by defendant to plaintiff insuring, among other property, "his double-frame building occupied as a dwelling." One of the conditions attached to the policy was to the effect that if there appear any "fraud or false swearing" in the proofs of loss the insured should forfeit all claims under the policy.

The complaint, after describing the policy, alleged that at the time of, and before the issuing thereof, the principal story of the double-frame building mentioned therein was occupied by Mrs. Elizabeth Collette, the front room of which was used by her as a grocery; that the defendant's agent, residing in the city, made a preliminary survey and examination of said building, and particularly of the grocery part occupied and used as aforesaid, before making said contract of insurance and the delivery of said policy; that plaintiff called the attention of the agent thereto, before and at the time of the making and issuing of said policy, inquiring whether the fact that a grocery was so kept should not be expressed and stated in the policy, to which the agent replied: no, it is not necessary to mention it; so small a matter as that is never mentioned in the policy; and so the same was not expressed in said policy; and it averred that the omission to make mention of such fact was the act of defendant not of plaintiff, and asked for a reformation of the policy to conform to the agreement and for judgment for amount of loss.

There was no written application and the policy was filled up by defendant's local agent. Plaintiff was permitted to prove on the trial, under objection and exception, the fact so alleged in the complaint, also that plaintiff returned the policy to defendant's agent and desired the same to be corrected by stating the fact that a grocery was kept in the building, and that the agent corrected the policy in some other matters to which his attention was called, but declined to correct it in this respect for the reasons above stated, saying that it made no difference, that it was all right as it was; also that after the issuing of the policy defendant's secretary and general agent examined the property in company with plaintiff, after having



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Statement of case.

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seen and read the policy, and pronounced it a good risk and acceptable.

At the close of the evidence defendant's counsel moved to strike out this evidence, on the ground that it was inadmissible to vary the terms of the contract, which motion was denied and said counsel duly excepted.

In the proofs of loss verified by plaintiff it was stated that the building was occupied as a dwelling-house "and for no other purpose whatever."

The defendant's counsel moved for a nonsuit upon the grounds: First. That a portion of the property insured is described in the policy as a dwelling, when in fact it was occupied as a grocery. Second. Upon the ground that the proof of loss sworn to by the plaintiff falsely states that the premises in question being a double-framed house were occupied as a dwelling, and for that purpose only, and that under the conditions of the policy any fraud or false swearing in the proof of loss should forfeit the policy. Third. Upon the ground that the proof does not make out a case for reforming the policy, it being shown that the plaintiff knew what was in it, and there is no proof of any mistake of fact. Fourth. That no preliminary proofs were given to the company upon the basis of the policy reformed as is claimed by the plaintiff in this case.

The motion was denied and defendant's counsel duly excepted. The jury found a verdict for the amount of the loss, and judgment was perfected thereon without any statement as to a reformation of the policy.

*Samuel Hand* for the appellant. The statement in the policy as to occupancy of the building was a warranty that it was so occupied. (*Wall v. E. R. Ins. Co.*, 3 Seld., 370; *Chase v. Ham. Ins. Co.*, 20 N. Y., 52; *Parmalee v. Hoff. Ins. Co.*, 54 id., 196; *Lappin v. Charter Oak Ins. Co.*, 58 Barb., 325, 348; *Sarsfield v. Met. Ins. Co.*, 42 How., 97; 61 Barb., 419; *Brice v. Lorillard Ins. Co.*, 55 N. Y., 240.) The court erred in receiving evidence as to what occurred between plaintiff and the agent Kernan. (42 How., 101; *Plumb v. Cutt.*

## Statement of case.

*Ins. Co.*, 18 N. Y., 392; *Brown v. Catt. Ins. Co.*, id., 385.) No case was proved for reforming the contract. (*Brice v. Lorillard Ins. Co.*, 55 N. Y., 240; *Mead v. Westchester Ins. Co.*, 2 N. Y. Week. Dig., 323.) The fact that the policy was written by defendant's agent does not change its legal effect or relieve plaintiff from the consequences of the breach of warranty. (*Rohrbach v. Ger. F. Ins. Co.*, 62 N. Y., 407; *Alexander v. Ger. F. Ins. Co.*, N. Y. Week. Dig., 175; 42 How., 97; *Appleby v. Astor F. Ins. Co.*, 54 N. Y., 253.) The policy was forfeited under the clause in reference to false swearing in the preliminary proofs. (*Ferriss v. N. A. F. Ins. Co.*, 1 Hill, 71, 74; *Howard v. City F. Ins. Co.*, 4 Den., 502, 508.) Plaintiff was bound by the proofs of loss furnished and cannot show a different state of facts on the trial. (*Irving v. Excel. F. Ins. Co.*, 1 Bosw., 507; *Underwood v. Farmers' Ins. Co.*, 57 N. Y., 500; *O'Reilly v. Guardian Ins. Co.*, 60 id., 169.)

*A. J. Colvin* for the respondent. Evidence of the transactions of defendant's agent in the taking and perfecting of the policy, in answer to questions put to plaintiff as a witness, was proper. (*Un. Mut. L. Ins. Co. v. Wilkinson*, 11 Am. L. J. [N. S.], 485; 13 Wal., 225.) Omissions or errors of statement in describing the property must be imputed to defendant, and it is estopped from setting them up in avoidance of the contract. (*Rowley v. Empire Ins. Co.*, 36 N. Y., 550; *Bodine v. Exch. F. Ins. Co.*, 51 id., 121; *Owens v. Hol. Pur. Ins. Co.*, 56 id., 565; *Plumb v. Cat. Ins. Co.*, 18 id., 394; *Un. Mut. L. Ins. Co. v. Wilkinson*, 11 Am. L. Reg. [N. S.], 485; 13 Wal., 394.) There was no warranty by plaintiff that the description was correct. (*Justice v. Lang*, 52 N. Y., 323; 56 id., 565, 573; 18 id., 392; 13 Wal., 222; 36 N. Y., 550; 56 id., 565, 573; *Parker v. Amazon Ins. Co.*, 34 Wis., 363; *Masten v. Madison Ins. Co.* 11 Barb., 624; *Metz v. Lans. F. Ins. Co.*, 13 Alb. L. J., 228.) Defendant is estopped from alleging error of plaintiff in using the description in the policy in the proofs of loss. (*Taylor v. R. Wms. Ins. Co.*, 51

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N. H., 50; *Burnstead v. Div. Mut. Ins. Co.*, 12 id., 97; *Vos v. Robinson*, 9 J. R., 198; *Ætna Ins. Co. v. Tyler*, 16 Wend., 385; *How. v. City F. Ins. Co.*, 4 Den., 502; *Ferriss v. N. A. Ins. Co.*, 1 Hill, 71.) The evidence was ample for a reformation of the contract. (*Bryce v. Lorillard Ins. Co.*, 55 N. Y., 240; *Meads v. Westchester F. Ins. Co.*, 2 N. Y. Week. Dig., 323.)

FOLGER, J. The case was given to the jury without exception to the charge, in any matter which is presented to this court on the points made here. The legal positions laid down to the jury must be taken as the law of the case. They found for the plaintiff upon the questions of fact submitted to them, and the defendant is bound by the verdict and the judgment thereon, unless during the trial there was some error made by the court, and which is brought up by the exceptions taken.

It is not to be denied that this phrase in a policy of fire insurance, viz., "*occupied as a dwelling*," is ordinarily a warranty by the insured that the building so described, and on which the risk is taken, is in fact, at the time of issuing the policy, a building occupied only as a dwelling-house. (*Alexander v. Germania Fire Ins. Co.*, Ms., Ct. of Appeals,\* citing *Wall v. East River Ins. Co.*, 7 N. Y., 370; *Parmalee v. Hoffman Fire Ins. Co.*, 54 id., 193.) If the plaintiff is to be held to the policy in this case as it is written, he has warranted that the building insured, was at the time of insurance occupied as a dwelling-house; and in that case, the facts undisputed, show that there has been a breach of the warranty.

It is claimed by the plaintiff that there is evidence in the case, which relieves him from the pressure of this phrase in the contract, and from the consequences. It was shown upon the trial, to the satisfaction of the jury, that the plaintiff and the local agent of the defendants, when the latter filled out and issued the policy, knew that the building in question was, in fact, occupied otherwise than only as a dwelling house; that they both meant to insure the building in that other state

\*66 N. Y., 464.

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of occupation; that they both thought, that the terms used in the policy in describing the building, were such as would designate it in that state of occupation; that it was their intention to use terms of that purport, and that after the policy was issued, the plaintiff doubting whether that intention had been well carried out, and expressing that doubt to the local agent, was assured by him that the phraseology used was apt and ample to express their meaning and intention. It was upon this evidence that the case was given to the jury, and upon it they found for the plaintiff under the charge of the court.

The defendants contend that this evidence was not admissible, and should have been stricken out on the motion made by them to that end. If this action is to be tested as one purely at common law, it may be that this evidence could not be admitted to vary the contract. If the language used was ambiguous, or if it was used in some particular sense where susceptible of different meanings, parol evidence might have been proper to show what was the meaning of the parties in its use; but where the terms employed have a settled legal construction, they may not be contradicted therein by parol evidence. (*Pindar v. Resolute Fire Ins. Co.*, 47 N. Y., 114.) The plaintiff having taken the contract in the form of words in which it now appears, cannot, in an action at law vary its purport by parol evidence and prove that it does not mean what it says.

But it was not necessarily in this view alone that the evidence was offered and might have been received. In the case of *Pindar v. Resolute Fire Insurance Company* (*supra*), it was said: If the insured was not content to submit to those conditions he should have rejected the policy. In effect this is saying that the insured must make himself master of the form and contents of his policy when he receives it; and if it is not to his liking, he must effect a change, either in that policy, or by getting one from another underwriter. Now if the insured is disposed, and makes effort to do this, and is prevented, or thrown off his guard and dissuaded therefrom, by the act or

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declaration of the insurer, is not the latter estopped from setting up in bar of an action on the policy, the letter of the contract, and that the situation of the property does not agree therewith, and from claiming the strictly legal consequences therefrom? It was in evidence that, after the issuing of the policy to the plaintiff, he called the attention of the local agent to the erroneous description of the building insured, and was told that it made no difference. So, likewise, it was in evidence that the general agent and secretary of the defendant, with a knowledge of the description of the building in the policy, inspected in person the property insured and pronounced the risk taken a good one. This evidence was material and competent, as tending to show, that the plaintiff was not careless; was not thoughtlessly satisfied with the terms of the policy, but sought an emendation thereof, and was balked of a successful pursuit thereof by the action and declaration of the defendants through their agents and officers. Hence the admission of the evidence upon the trial was not erroneous; nor was it erroneous to retain it in the case against the motion of the defendant to strike it out.

Nor was it erroneous to receive the evidence, if it tended to make a case in equity, for a reformation of the policy. It was objected on the trial, that there was no allegation in the pleadings, that there was a mistake of fact, and that hence and because the plaintiff knew what the policy said when he received it, there was no case made for a reformation of the contract. The pleading of the plaintiff is inartificial in its statements, but it avers the existence of facts substantially as they afterwards appeared in evidence. There is no specific allegation of a mistake of fact; but it avers that which shows that the parties were mistaken as to the effect of the language which they used; and this is an averment of matter upon which a reformation of a contract may be based. (*Pitcher v. Hennessy*, 48 N. Y., 415.)

It is enough to authorize the reformation of a contract, if it appears that, through the mistake of both parties to it, the intentions of neither have been expressed in it. Now if a

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court if equity had a right to find from the evidence, that both the insurer and the insured meant to insure the very building that was burned; and meant to put in the policy no expression as to the character or situation of it, different from the facts; but, by a misconception as to the meaning and effect of language, have used terms which do express that which they did not intend to express, and which did fail to express that which they did intend to express; such evidence does make a case for a reformation of the policy, so as to conform it to the intentions and purposes of the parties. (*Many v. Beekman Iron. Co.*, 9 Paige, 188; *Pitcher v. Hennessy*, 48 N. Y., 415; *McCall v. Ins. Co.*, MS. Ct. of App., Sept., 1876.\*) They meant to insure the building which was burned; they meant to correctly describe it; they used words which they thought did correctly describe it. It turns out that in this they were honestly mistaken. It is in the power of a court of equity, on being satisfied of that, to so reform and rewrite the contract, as that it shall state truly what the parties in fact agreed to, and what they intended to write out as their agreement. It is true, that they knew what words were used in the instrument. Doubtless they knew the ordinary meaning of the words. The evidence, however, authorized a finding that they mistakenly supposed that those words, when used in a contract for insurance, were proper terms in which to describe the building intended by the plaintiff, and accepted by the agent of the defendant, as the subject of that contract. It resulted, therefore, from that mistake, that the contract failed to express the fact as agreed upon between them. The complaint in the action alleges facts, upon which to base a prayer for judgment, of a reformation of the policy, and for a recovery upon the policy as reformed, and makes that prayer. The evidence was admissible in this view of the case. (*Van Tuyl v. Westchester Fire Ins. Co.*, 55 N. Y., 657; *Cone v. The Niagara Fire Ins. Co.*, 60 id., 619.) It matters not, in this case, that the judgment contains no formal clause of reformation of the

\* 66 N. Y., 505.

contract. The point we are now considering, is as to the admissibility of the evidence under the issue made by the pleadings.

An action may be brought for a reformation of a contract, and for a recovery at the same time upon the contract when reformed (see *New York Ice Co. v. N. W. Ins. Co.*, 23 N. Y., 357), and it is not irregular to try such action before a judge and jury. (*Pitcher v. Hennessey, supra.*)

When the plaintiff furnished to the defendant the preliminary proofs of loss, he asserted therein that the building was occupied as a dwelling-house and for no other purpose whatever. He made oath thereto. The ninth condition attached to the policy, is, among other things, that if there appear any "fraud or false swearing," the insured shall forfeit all claims under it. It is plain from the testimony, that the matter thus asserted was not correct in fact. But was the making this statement, and the verification of it by oath, "*false swearing*," within the meaning of that phrase, as used in the policy? It is used there in association with the word "*fraud*," and must have a similar interpretation. The latter is any trick or artifice by one, to induce another to fall into, or remain in an error, to his harm. The former is a verified false assertion, which does deceive, or is fitted and likely to deceive, the one to whom it is made. But one may not be deceived by an assertion which, to his own knowledge, is false. The defendants, when the preliminary proofs were served upon them, had knowledge of the character and situation of the building. Their agents and their secretary knew; and that was knowledge in the defendants. They knew, too, that by the form of words used in the policy, the insurer and the insured meant, not a building occupied exclusively as a dwelling-house, but one for the most or main part so used, and at the same time used in part as a grocery and saloon. It is not to be seen how the insurer was deceived or likely to be deceived, by the use of a form of words in the proofs of loss, applied to a building described by that same form of words in the policy. The words in the policy, when charged with the meaning given to them by the parties using

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them, were not untrue as between them, though to the mind of others than the parties, they may not have conveyed a true description of the building. How can we say that the same words in the proofs of loss, used by the same parties, in reference to the same subject, were between them, false; though others, on reading them, would not get a true notion?

Another point is made by the defendant, viz.: That if the policy is taken as reformed, and made by a change of its terms, to express the real contract between the parties, then there have been no proofs of loss furnished by the plaintiff. This is not tenable. It is rather plausible than real. The plaintiff did furnish to the defendant a paper which, it must be conceded, was in some sort a proof of loss. It was furnished under the contract for insurance, which was really entered into between the parties. A reformation of the form of the contract would not change the contract. It would only make it in written shape what it was in fact, and what each party knew it to be in fact. When the plaintiff gave to the defendant his proofs of loss, he gave, and it received, under that contract, which was the contract as they knew it always to have been. The subsequent change of the written form of the contract, as it did not make another contract in fact, so it did not make another contract requiring new or further proofs of loss. Knowing what the contract really was, the defendant received the proof of loss under it, and, if it was defective in form or matter, should have returned it, pointing out the defect. Not having done so the defendant may not now object to it.

This disposes of all the points raised by the defendants in this court, and of all the exceptions taken upon the trial and here relied upon. The case was not given to the jury, in precisely the view of it which we have taken. But there was no exception by the defendants to the charge. If there was error in it, it is not brought to our attention.

The defendants having failed to show any error by the points made here upon the exceptions taken on the trial, the judgment appealed from should be affirmed.



## Statement of case.

All concur, except RAPALLO, J., not voting; ALLEN, J., in result, and ANDREWS, J., on ground that evidence was proper to reform the contract.

Judgment affirmed.

THE PHENIX WAREHOUSING COMPANY, Respondent, v. DANIEL  
D. BADGER, Appellant.

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In an action to recover an unpaid balance of a subscription to the capital stock of a manufacturing corporation, where it appears that defendant subscribed for the stock, acted as a trustee of the corporation, took part in its management and contracted with it as a corporation, he cannot dispute the validity of the incorporation.

A subscription to the articles of incorporation, with a statement of the number of shares opposite the name, is a sufficient and binding subscription for the stock, and takes effect upon the filing of the certificate.

An action may be brought upon the original subscription; it is not necessary to aver calls, at least after the lapse of two years from the time of incorporation.

Such an action brought by the corporation, may be continued by a receiver subsequently appointed in the name of the original party.

An abandonment of its business by the corporation, either before or after the commencement of the action, is no defence where it appears that the incorporation is indebted to more than the amount of the subscription, as the action is prosecuted for the benefit of creditors.

An objection that other subscribers who have not paid should have been made parties, is not available on appeal where the objection was not raised by answer, and where there were no findings or requests to find in reference thereto, or exceptions raising the point.

The refusal of a referee in such an action to allow an amendment of the answer setting up that the signature of another apparent subscriber was not genuine, and that defendant was misled thereby, is not the proper subject of exception; if the referee has power to allow the amendment it is matter of discretion.

Subsequent to defendant's subscription an arrangement was made, with the approval of the corporation, that defendant should transfer a portion of his stock to E., the latter delivering to the corporation his notes therefor, indorsed by defendant, the stock to be transferred when the notes were paid. Notes were so given, which were renewed from time to time. One of the renewals was transferred by the corporation to P. as collateral security. P. returned it to the corporation, and with

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his consent it was produced and offered for cancellation on the trial. *Held*, that defendant was not entitled to have the amount thereof deducted from the amount due on his subscription.

(Submitted October 8, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, modifying a judgment in favor of plaintiff entered upon the report of a referee, and affirming it as modified. (Reported below, 6 Hun, 293.)

This action is brought to recover of the defendant an alleged unpaid balance of his subscription to the capital stock of the plaintiff.

The corporation was attempted to be created under the general law of 1848, authorizing the formation of corporations for manufacturing, mining, mechanical and chemical purposes. The certificate, under and by virtue of which the defendant and others undertook to create the corporation, was filed in September, 1863. The purposes specified in the certificate were stated as follows: "For the purpose of building tanks of iron or other materials, and storing and keeping for hire oil of various kinds, and for doing all such other business as may be pertinent to or connected with the storage of oil, petroleum or other articles, for compensation."

The defendant claimed that the act of 1848 did not authorize the creation of a corporation for the purposes expressed in the certificate, and that therefore his subscription was void.

Defendant was one of the originators of the enterprise, and for several years one of the trustees, and took an active part in the organization and management of the company, and contracted with it as a lawfully organized corporation. The corporation became insolvent, and after the commencement of the action a receiver was appointed, who thereafter prosecuted the action in his own behalf and for the benefit of creditors. The only subscription made by the defendant was to the certificate whereby the corporation was created, and placing opposite to his signature the number (250) of shares taken by him. Fifty shares of the 250 subscribed for by the defendant were paid for by him, and by his direction transferred to an

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iron manufacturing company of which he was the president. After the organization of the company the defendant made an arrangement with John Egerton, with the consent of the company, whereby Egerton agreed to take off the hands of the defendant 200 shares of this stock, by giving his notes to be indorsed by the defendant for the amount. Egerton gave three notes in July, 1864, indorsed by the defendant for \$2,500 each, and the defendant thereupon gave an order to the company that on the payment of those notes an equal amount of stock should be transferred to Egerton. The three notes were paid and seventy-five shares of the stock were transferred to Egerton, in pursuance of the order of the defendant. In October, 1864, Egerton gave three other notes, indorsed by the defendant; one for about \$1,500, which was given for the interest which had accrued on the unpaid subscription of the defendant, and two others, due in January and February, applicable to the purchase of the stock. With these last notes the defendant gave an order on the company that, on the payment of the three notes, fifty more shares of the stock should be transferred to Egerton, and also an order on the company to pay Egerton the dividend on the whole 200 shares. The \$1,500 note was paid. The larger notes were renewed several times, with the indorsement of the defendant, until finally one of the notes so renewed was given up to Egerton, and a new note for an extended time, not indorsed by the defendant, but by another party, was received by the company as a substitute for the note so surrendered. The case does not show that this was with the knowledge or consent of the defendant.

The remaining \$2,500 note was renewed, with interest added, until it amounted to \$2,790.74, for which sum a note was given by Egerton, indorsed by defendant. This was transferred by the corporation to one Power, as collateral security for a claim against the company. He brought suit against defendant thereon before the commencement of this action, which was pending at the time of trial. But on the trial it was produced by the plaintiff, and with the consent of Power offered for cancellation.

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The referee directed judgment for the whole amount of unpaid subscription, with interest, not giving credit for either of the two \$2,500 notes or their renewals. The General Term modified the judgment by deducting therefrom the amount of the \$2,500 note, with interest, which was taken up as above stated, and the note of Edgerton, indorsed by a third person, substituted therefor.

Further facts appear in the opinion.

*John Winslow* for the appellant. Plaintiff was never legally organized for any lawful purpose. (*Makehurne M. Co. v. Woodbury*, 14 Cal., 424; 14 N. Y., 546; *N. Y., D. and C. Co. R. R. Co. v. Mabbett*, 58 N. Y., 397; *M. and T. P. R. Co. v. Lapham*, 18 Barb., 312.) The declaration in the certificate, as to the number of shares taken, does not amount in law to a subscription. (*Burrow v. Smith*, 10 N. Y., 550; 16 id., 457, note; 6 Pick., 23; 31 Me., 470; 24 Barb., 518; 24 N. Y., 150; 1 Cal., 381; 6 Mass., 40; 8 id., 138; 14 id., 286; *A. & A. on Corp.*, 479.) The agreement that defendant should not be held for more than fifty shares, was executed and should be upheld. (Redf. on Railways, 83, §§ 7, 2, 3; id., §§ 3-7; *Dorris v. French*, 11 Sup. Ct. R., 292; 41 Pa. St., 64; 21 Ill., 96; 18 id., 576; 10 Barb., 260; 2 id., 294; 16 Wal., 390.) The legal effect of the abandonment by defendant of its business would be to defeat this action. (15 B. Mon., 21; 18 Barb., 312; Redf. on Railways, 80, § 6, p. 94.) If defendant's alleged subscription were valid, the most that could be done would be to sue him with all other non-paying subscribers, to compel *pro rata* contributions to pay debts. (*Mann v. Pentz*, 3 N. Y., 415-422; 25 id., 214; 12 Abb., 268; 1 Lans., 381; 2 id., 12.)

*F. E. Dana* for the respondent. No demand of payment was necessary. (*Spear v. Crawford*, 14 Wend., 20; *Palmer v. Lawrence*, 3 Sand., 164; *N. R. R. Co. v. Miller*, 10 Barb., 260; *Sch. R. R. Co. v. Thatcher*, 11 N. Y., 103; *Buffalo, etc., R. R. Co. v. Mason*, 16 id., 452; *Rens., etc., R. R. Co. v.*

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*Borst*, 31 id., 535; *Dorris v. French*, 11 N. Y. Sup. Ct., 292.) Defendant cannot now be permitted to allege any defect in plaintiff's organization. (*Schen. R. R. Co. v. Thatcher*, 11 N. Y., 103; *Aspinwall v. Sacchi*, 57 id., 331; *Buffalo, etc., R. R. Co. v. Carey*, 26 id., 75; *White v. Ross*, 15 Abb., 66; *O., etc., P. R. Co. v. Rust*, 5 How., 300; *Sands v. Hill*, 42 Barb., 654; *White v. Coventry*, 29 id., 305; *Hyatt v. Esmond*, 27 id., 601; *Cooper v. Shover*, 41 id., 51; *Dorris v. Sweeny*, 64 id., 636; 60 N. Y., 463; 11 N. Y. Sup. Ct. R., 292; id., 164.) The contract of subscription merged all prior and contemporaneous negotiations, and parol testimony is not proper to alter and vary it. (*Thorp v. Ross*, 4 Keyes, 536; *Riley v. City of Brooklyn*, 46 N. Y., 444; *Westcott v. Thompson*, 18 id., 363; *Morton v. Woodruff*, 2 id., 153; *Van Keller v. Schulting*, 50 id., 108; *Mayor, etc., v. Brooklyn F. Ins. Co.*, 3 Abb. Ct. App. Dec., 251; *W. M. R. R. Co. v. Eastman*, 34 N. H., 124; *Pittsburgh R. R. Co. v. Stewart*, 41 Pa., 54; *Conn., etc., R. R. Co. v. Bailey*, 24 Vt., 465; *Erie, etc., R. R. Co. v. Patrick*, 2 Keyes, 256; *Burke v. Smith*, 16 Wall., 390; *Piscat. Ferry Co. v. Jones*, 39 N. H., 491.) The fraudulent representations of the projectors of the company could not affect the subscription or release the subscriber. (*Oglevie v. Knox F. Ins. Co.*, 22 How. [U. S.], 380; *Buffalo, etc., R. R. Co. v. Dudley*, 14 N. Y., 336; *Kelsey v. N. L. Oil Co.*, 45 id., 505; *Litchfield Bk. v. Church*, 29 Conn., 137; *Graff v. Pitts., etc., R. R. Co.*, 31 Pa., 489.)

RAPALLO, J. The due incorporation of the plaintiff is expressly admitted by the answer. But were it otherwise, the defendant is not in a position to dispute the validity of the incorporation. He had become a stockholder, acted for several years as a trustee, taken part in its management and contracted with it as a corporation. (*Eaton v. Aspinwall*, 19 N. Y., 119; *Buffalo, etc., R. R. Co. v. Cary*, 26 id., 75; *Aspinwall v. Sacchi*, 57 id. 331; *White v. Ross*, 15 Abb. Pr., 66.)

The subscription by the defendant contained in the cer-

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tificate of incorporation for 250 shares of the capital stock, was sufficient in form and substance, and took effect simultaneously with the filing of the certificate. (*Buffalo, etc., R. R. Co. v. Dudley*, 14 N. Y., 336; *Lake Ontario, etc., R. R. Co. v. Mason*, 16 N. Y., 451, 459, note; *Dayton v. Borst*, 31 N. Y., 435.)

The allegation of an agreement that the defendant's subscription was to be binding upon him to the extent of fifty shares only, and the allegation that as to 200 shares, the defendant was released and Egerton substituted in his place, are negatived in point of fact by the findings of the referee, and are not sustained by uncontroverted or conclusive proof. It is not necessary, therefore, to consider whether they would have constituted a defence if found to be true.

As to the defence that the company abandoned its business, the referee has found, as matter of fact, that this did not occur until after the commencement of this action. It is immaterial, however, whether it was before or after, as this action is being prosecuted for the benefit of creditors, and it appears that there are judgments against the company for more than the amount recovered of ~~the defendant~~.

The objection that all other subscribers who have not paid in full should have been joined as defendants, is not available at this stage of the case, not having been taken in the answer, and there being no finding or request to find, nor exception, raising any such point.

The action having been brought by the company before the appointment of the receiver, could be continued in the name of the original party for the benefit of the receiver. (Code, § 121.) The right to collect the unpaid subscriptions was transferred to the receiver. (2 R. S., 463; § 36, Laws of 1852, p. 67; Laws of 1860, p. 699; 2 R. S., 469, §§ 67, 69; *Rankine v. Elliott*, 16 N. Y., 377; *Tracy v. First Nat. Bank of Selma*, 37 id., 523.)

The defence that the signature of R. Egerton to the subscription list was not genuine, and that the defendant was misled thereby, was not set up in the original answer. The

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Opinion of the Court, per RAPALLO, J.

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refusal of the referee to allow it to be set up by amendment, even if he had power to grant the application, was matter of discretion and not the proper subject of an exception.

The claim that the note of \$2,790.74, made by Egerton and indorsed by the defendant, should be deducted from the amount due by the defendant on his subscription is not tenable. There is no proof that the company accepted the note as payment, even if the officers had power to do so. Although the note had at one time been in the hands of G. F. Power, as collateral security, he had returned it to the company, and at the time it was produced and offered for cancellation with the consent of Power.

This action was properly brought upon the original subscription and it was not necessary to aver calls. By his subscription, to which no condition or stipulation as to time of payment was attached, the defendant undertook to pay for his shares according to the conditions of the charter. (*Rensselaer, etc., Plank-road Co. v. Barton*, 16 N. Y., 457, note; *Lake Ontario, etc., R. R. Co. v. Mason*, id., 451, 464.) The act under which this company was incorporated, requires that the whole capital stock be paid in within two years. Without intimating that this is a limitation upon the right of the company or the receiver to require immediate payment, it may be observed that the two years had elapsed, and upon any theory the subscription was past due when this action was commenced.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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**DAVID F. BARNEY, Appellant, v. THE OYSTER BAY AND HUNTINGTON STEAMBOAT COMPANY, Respondent.**

A common carrier of passengers may establish on his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders from passengers in competition with such agency.

Plaintiff, an expressman, sought passage upon defendant's boat for the purpose, among other things, of taking, while on the boat, orders from the passengers for the delivery of baggage. Defendant had granted the privilege of transacting this business on the boat to another, and as plaintiff continued it after having been directed to desist, and refused to promise to discontinue it, defendant caused him to be ejected from its boat, and refused him passage. In an action to recover damages, *held*, that defendant's action was justifiable, and that it was not liable.

(Submitted October 6, 1876; decided November 14, 1876.)

**APPEAL** from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of defendant entered upon an order nonsuiting plaintiff on trial, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for ejecting plaintiff from defendant's steamboat and for refusing him passage thereon.

Defendant was the owner of a steamboat and the carrier of passengers and freight thereon between New York and Jones' Dock, near Huntington, Long Island. Plaintiff was engaged in the express business between New York and Huntington. He had formerly been the authorized expressman on defendant's boat receiving orders for the delivery of passengers' baggage and taking charge of and delivering the same under contract with it, but the privilege of transacting this business on the boat had been granted by defendant to another person. Plaintiff, contrary to the directions of defendant, continued to advertise and transact his business as before, and he refusing to promise to discontinue the business while on the boat; he was, in consequence of such refusal, at one time ejected from the boat, after he had purchased a ticket, and at other times was refused a passage.



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Opinion of the Court, per ANDREWS, J.

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*J. M. Guiteau* for the appellant. The refusal to allow plaintiff on its boat cannot be justified by defendant on the ground that his object in obtaining a passage was to interfere with the interest or patronage of defendant. (Ang. on Com. Car., § 529; *Jenks v. Coleman*, 2 Sumn., 221.) The refusal could not be justified by showing the contract with a third person alleged in the answer. (*Sanford v. R. Co.*, 24 Penn., 378; *N. E. Ea. Co. v. Me. C. R. R. Co.*, 57 Me., 188; 2 Am., 31; *Bennett v. Dutton*, 10 N. H., 481; *Markham v. Brown*, 8 id., 523; *Mariott v. L. and S. W. R. Co.*, 8 E. C. L., 498.)

*Thos. Young* for the respondent. Plaintiff could not carry on his business on board defendant's vessel, without its consent. (2 N. Y. S. C., 598; Story on Bail., § 591, *a*; § 497, note 3; *W. and P. R. R. Co. v. Miles*, 55 Penn., 209; *Burgess v. Clements*, 4 M. & S., 306, 314; *Fell v. Knight*, 8 M. & W., 269; *Comm. v. Powers*, 1 Am. R. Cas., 389; *N. J. St. Nav. Co. v. Mer. Bk.*, 6 How. [U. S.], 344; 23 Vt., 186.)

ANDREWS, J. It is the general duty of a carrier of passengers to carry all persons who offer themselves as passengers, provided there is room in the conveyance, upon being paid the usual fare.

The carrier however, may make reasonable rules and regulations for the conduct of his business, and when they are made known, passengers are bound to observe them. He may carry on, in connection with his business of carrier, any other business, and may use his property in any way he may choose to promote his interests, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and except to the extent to which he has devoted it to public use, by the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons. For instance, the sale of books, papers, or refreshments, are common incidents to the business of a carrier by certain modes of conveyance, and the carrier may avail himself of the oppor-

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Opinion of the Court, per ANDREWS, J.

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tunity which his business gives him, to supply the special wants of travelers in these and other respects, and appropriate to himself the profits of the business and exclude third persons from entering the car or vessel to carry on the same business, in opposition to him. He may grant or refuse the privilege at his option. In this no right of a passenger is invaded. The passenger has the right to be carried and to enjoy equal privileges with others, or at least to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that in matters not falling within the contract of carriage, the carrier shall surrender in any respect, rights incident to his ownership of his property. So, also, a carrier may establish, for the convenience of passengers and for his own profit, on his car or vessel, an agency for the delivery of baggage of passengers, and exclude all other persons from entering, to solicit or receive orders from passengers, in competition with the agency established by him. This is in no just sense a monopoly. It is simply saving to the carrier a legitimate advantage which his position and business gives him.

These views are decisive of this case. The defendant did not refuse to carry the plaintiff as a passenger on its boat. The plaintiff sought passage for the purpose, among other things, of taking, while on the boat in his capacity of expressman, orders from passengers for the delivery of baggage. The defendant had placed an expressman on the boat for that purpose, a position which for two years before the plaintiff had occupied, and the defendant as is clearly inferable had a pecuniary interest in the business. The defendant refused to carry the plaintiff unless he would discontinue the business of expressman while on the boat. This we think the defendant was justified in doing. (Story on Bailments, § 591, *a*; Angell on Car, § 530; *Jenks v. Coleman*, 2 Sumn., 22.)

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

## Statement of case.

SETH BAKER et al., Respondents, v. JOHN J. LEVER et al.,  
Appellants.

• 67 304  
128 648

Where a vendee has been induced to purchase property by means of fraud on the part of the vendor, mere want of diligence in discovering the fraud, does not deprive the vendee of his right to rescind because thereof; he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, he has a perfect right to rescind.

*It seems* that, as a general rule, a delay to rescind, after discovery of the fraud, does not operate as a waiver of the right, or as a confirmation of the fraudulent contract.

One to whom a bond and mortgage, given to secure the price of property upon a fraudulent sale, is assigned without any pecuniary consideration being paid but simply as a gift, does not occupy the position of a *bona fide* purchaser, so that the contract cannot be rescinded as to him.

(Submitted October 6, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, modifying a judgment entered upon the report of a referee. (Mem. of decision below, 5 Hun, 114.)

This action was brought to have a bond and mortgage executed by plaintiff to William J. Lever, originally one of the defendants herein, and whose personal representatives are now parties defendant, declared void, and that the same be set aside and canceled of record. The referee found the following facts:

That in March, 1869, the plaintiff Seth Baker applied to William J. Lever to learn where a loan of some money could be made, and was by him informed that his son (the defendant John J. Lever) had \$500 which the latter might loan; that afterwards said plaintiff called upon the father and son and then understood from them that the loan of \$500 would be made by John J. Lever, to him, if he would purchase of William J. Lever certain capital stock of the Andover Woolen Manufacturing Company; that Baker

## Statement of case.

agreed to purchase six shares of \$100 each, of said capital stock, for the sum of \$500, and thereupon the said John J. Lever loaned to him the sum of \$500, and the said William J. Lever sold to him the said stock, and delivered to him certificates thereof, with transfers to him indorsed thereon, and the plaintiff Seth Baker, on the 15th of March, 1869, executed his bond to the defendant John J. Lever, conditioned for the payment of the \$500 loaned, and interest, and with his wife Elizabeth the plaintiff Baker executed a mortgage to secure the payment of the said bond to the said John J. Lever, and at the same time the said plaintiff Seth Baker executed his other bond of that date, conditioned for the payment to William J. Lever \$500 (the price of such stock) and interest, and with his said wife executed a mortgage to the said William J. Lever, who afterwards, on the 17th day of March, 1869, assigned the same to his son, the defendant John J. Lever as a gift or advancement to him, as was contemplated and understood when the loan and sale of stock were made as aforesaid, which last mentioned bond and mortgage are the ones in question. That at the time of the sale of the said stock to Baker, he believed that it was worth the price he agreed to and did pay therefor; that in fact, the said stock was then worth and saleable for only the sum of thirty per cent of its nominal value, and continued saleable for that sum for the period of four months thereafter; and that afterward the property of the said company was sold and the proceeds thereof were not more than sufficient to pay liabilities of the company, and said stock and all the capital stock of the company became and was thereafter actually worthless. That the said Andover Woolen Manufacturing Company was organized in 1866; that said William J. Lever was one of the original subscribers to the capital stock, and had been a stockholder from that time; that he was president of the company from 1867 to May, 1868, and at the time of the sale by him of the said stock to the plaintiff, he was familiar with and knew the condition of the company; that up to that time the business of the company had been operated at

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Statement of case.

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a loss, and he was advised that the liabilities of the company, exclusive of the capital stock, nearly equaled the value of its property, real and personal, and the plaintiff was ignorant of the actual condition of the affairs of the company; that the value of the stock, the valuation and prospect of the company were at the time of the negotiation and sale in question the subject of conversation between the plaintiff and the said William J. Lever, and the latter then suppressed and omitted to state to the plaintiff the facts in relation to the situation of the company of which the said William J. Lever had knowledge, and thereby induced the plaintiff to believe and understand that the value of the said six shares of stock was \$500, and those facts within the knowledge of the said William J. Lever, which affected the value of the said stock, were then suppressed by the latter with the intent and for the purpose of inducing the plaintiff to make the purchase at the price aforesaid, and the latter was thereby induced to make the purchase and give the bond and mortgage aforesaid, and that such transaction was fraudulent on the part of the said William J. Lever. That the plaintiff, Seth Baker, has held the said stock since such transfer, and on the 16th day of November, 1872, he offered to return and deliver the certificates to William J. and John J. respectively, and tendered the same and offered to make transfers thereof to such one of them as they might advise or direct, and demanded that the said bond and mortgage be surrendered up and canceled; that the defendants, and each of them, refused to accept the return and transfer of the said stock, and the said defendant John J. Lever also refused to surrender up or cancel the said bond and mortgage.

The referee found, as conclusions of law, among other things:

That the said sale of the stock, the price of which the said bond and mortgage were given to secure, was fraudulent on the part of the said William J. Lever. That on the 16th day of November, 1862, the plaintiff was not entitled to a surrender and cancellation of the said bond and mortgage

## Statement of case.

upon the demand thereof then made by him; but that he would then have been entitled to such surrender and cancellation if he had then tendered or offered to pay to the defendant, John J. Lever, \$180 and interest thereon, from March 15, 1869, less two payments of thirty-five dollars each, applied as of the time they were made respectively. That on payment to the said John J. Lever of the sum produced as last aforesaid, amounting at the date of this report to \$160.27, with interest thereon from the date hereof, and the defendant's costs of this action, the said plaintiff will be entitled to have the said bond and mortgage delivered up and canceled; and, if the said mortgage has been or shall be recorded, then upon such payment the plaintiff will also be entitled to have satisfaction thereof acknowledged and the said mortgage satisfied of record.

The General Term adjudged that the judgment be reversed so far as it required the payment of thirty per cent and costs, and that the judgment be modified and entered that the bond and mortgage described in the complaint are fraudulent and void; and that the same be delivered up to the plaintiff Seth Baker, and canceled, and that the defendant John J. Lever execute and deliver satisfaction of the mortgage to said Seth Baker.

*James H. Stevens, Jr.*, for the appellants. The delay of four years in offering to rescind was a confirmation of the contract. (*Fisher v. Friedenhall*, 21 Barb., 82; *Roth v. Palmer*, 27 id., 654; *Muttawan Co. v. Bentley*, 13 id., 644; *Wheaton v. Baker*, 14 id., 594; *Voorhies v. Earl*, 2 Hill, 288; *Kennedy v. Thorp*, 51 N. Y., 174; *Bk. of Beloit v. Beale*, 34 id., 475; *Goss v. Mather*, 2 Lans., 285; *Baker v. Robbins*, 2 Den., 138; *Baker v. Spencer*, 47 N. Y., 562; *Ross v. Titterton*, 6 Hun, 284; *Bruce v. Davenport*, 1 Abb. Ct. App. Dec., 237; *Upton v. Tribilcock*, 13 Alb. L. J., 27.) Lever being an innocent purchaser for value of the bond and mortgage, as against him the right to rescind could not exist. (*Winne v. McDonald*, 39 N. Y., 240; *Dows v. Greene*,

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Opinion of the Court, per MILLER, J.

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24 id., 644; *Fassett v. Smith*, 23 id., 252; *Lacker v. Rhodes*, 45 Barb., 499.)

*Hamilton Ward* for the respondents. A person deceived by the fraudulent misstatements of another owes him no duty of active vigilance in the discovery of the fact that they are false. (*Baker v. Spencer*, 47 N. Y., 562; *Ketchum v. Traaswell*, 7 Alb. L. J., 137; *Brown v. Post*, 1 Hun, 304; *Neblett v. McFarland*, Alb. L. J., Feb. 19, 1876, p. 134.)

MILLER, J. The referee held upon the trial that the sale of the stock at the price which the bond and mortgage was given to secure was fraudulent and void, and adjudged, that on payment of the market value of the stock at the time of the sale and interest and with defendant's costs of the action, the bond and mortgage be delivered up and canceled. The intent to defraud follows as a necessary result of the decision, and as no appeal was taken from the judgment by the defendants it must be assumed that they acquiesced in the right of the plaintiffs to relief from the fraudulent contract. If entitled to any relief it was not a partial one but to an entire exemption from the fraudulent claim. A failure of the plaintiffs to do all which the law required in order to rescind the contract would be a complete bar to any recovery. The rule on this subject is well established, that when a sale is fraudulent the party defrauded has a perfect right to rescind the contract, and to be restored to his former condition in all respects, upon offering to return the property purchased promptly after the fraud is discovered. None of the authorities to which we have been referred hold that a delay to rescind until a discovery generally operates as a waiver of the right to rescind or as a confirmation of a fraudulent contract. While cases may perhaps arise where the circumstances attending the delay are such as to deprive the party of his right to rescind, after he has ascertained that a fraud has been perpetrated, this is not the general rule. It is quite sufficient that an effort to return the property is made after the discovery of the fraud. We have

## Opinion of the Court, per MILLER, J.

a right to assume, in support of the judgment in this case, that the sale was fraudulent and void, that a proper offer was made in due season and that there was no laches in this respect. The referee has found that the plaintiff who purchased the stock had opportunities to and might have with reasonable diligence ascertained the situation of the company in time to have tendered or offered the return of the stock and while it had a market value, and he was guilty of laches by omitting to do so within that time. This was not enough to show knowledge of the fraud, and not sufficient to bar the right of the plaintiffs to avail themselves of it. It might well be that opportunities to ascertain the fraud would be of no avail to a person unfamiliar with the business transactions of corporations, as was probably the fact here, and the authorities do not hold that a mere want of diligence without knowledge of the fraud is sufficient to deprive a party of his legal right to rescind a fraudulent contract. Something more is required and courts will not for this reason alone avert the consequences of a fraudulent act. In *Brown v. Post* (1 Hun, 303), it was held that a person deceived by the fraudulent misstatements of another owes him no duty of active vigilance in the discovery of the fact that they are false, and that there is nothing in the law requiring him to be protected from the consequences of his wrong, because the person imposed upon did not suspect him, and adopt some means to discover the imposition. This case was affirmed in this court on the opinion in the court below. (62 N. Y., 651; see also, *Baker v. Spencer*, 47 id., 562.) Knowledge of the fraudulent act is generally required, and bare suspicion is not enough. We have been referred to the *dicta* of judges where the doctrine is laid down that the rescission must be made after the party has had reasonable opportunity to discover the fraud, and that vigilance and care must be exercised. (*Ross v. Tilterton*, 6 Hun, 284; *Septon v. Frutlock*, 13 Alb. L. J., 27.) But these cases must be considered in connection with the facts there presented, and do not establish any general rule applicable to all cases. More especially are these decisions inapplicable where the judgment



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Opinion of the Court, per MILLER, J.

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sustains the allegation of fraud and gives partial relief on account of the same. It may also be remarked that the fact that the stock had a market value within four months after the sale is not material, so long as it was intrinsically worthless, and does not authorize a deduction by way of mitigating the loss of the party defrauded. (*Hubbel v. Meigs*, 50 N. Y., 480.) Under the facts presented, we think that there was no such want of diligence on the part of the party defrauded as entitled the defendants to the benefit of the market-value of the stock when sold, and the referee was wrong in allowing the same. Nor is there any ground for claiming that John J. Lever occupies the position of an innocent purchaser for value of the bond and mortgage, and that the right to rescind could not exist as to him. He paid no money, parted with no property and took the assignment without any pecuniary consideration and ostensibly as a gift. These facts do not impart a good title to him as a *bona fide* purchaser of a bond and mortgage given to secure the price of property upon a sale adjudged to be fraudulent. Even if such a defence might exist as to the whole cause of action it should not prevail here, where the plaintiff's judgment is not assailed.

It is not necessary in view of the discussion already had, to consider the defense of usury, and as the General Term were right in modifying the judgment of the court below, it must be affirmed, with costs.

All concur.

Judgment affirmed.

## Statement of case.

THEODORE F. WHEELER, Respondent, v. JOHN F. SCOTFIELD  
et al., Appellants.

67 311  
109 373

An action to foreclose a mechanic's lien is not an action "affecting the title to real estate or an interest therein" within the meaning of the amendment of 1874 to section 11 of the Code (chap. 322, Laws of 1874), and a judgment in such an action for less than \$500 is not appealable to this court.

67 311  
123 651  
67 311  
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It *seems*, that under the mechanic's lien law of 1873 (chap. 489, Laws of 1873), one who has performed labor for a contractor in the erection or repairing of a building or who has furnished materials therefor, will be presumed to have done so with the consent of the owner, in the absence of proof of any objection on his part.

By the terms of a building contract, the work was to be completed by December first; it was not so completed. The contractors were called upon to do extra work, and, with the consent of the owner, continued work until January eighth thereafter, when they failed and discontinued work. The owner did not declare the contract forfeited, but obtained the contractor's consent to go on and finish it. The cost of completing the work was less than the amount unpaid upon the contract, adding thereto the value of the extra work. In an action by a material-man to foreclose a mechanic's lien, *held*, that the owner could not claim the contract forfeited; but the inference was that he undertook to complete the building at the contractor's expense, and that the lienors were entitled to the residue.

(Submitted October 6, 1876; decided November 14, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Mem. of decision below, 6 Hun, 655.)

This action was brought to foreclose a mechanic's lien, filed under and in accordance with the provisions of chapter 489, Laws of 1873.

The facts as found by the referee, were substantially as follows:

On the 14th day of January, 1873, the firm of Coons & Pearson entered into a contract in writing with the defendant Scofield to furnish materials and erect for him a house on his

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Statement of case.

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farm near Penn Yan, and to finish the same in a good, workmanlike manner, by the first of December then next, for the sum of \$3,600, payable in installments. Said defendant had the right to make changes in the building, the cost of which was to be paid by him if they increased the expense, and to be deducted from the contract-price if they lessened the expense. Scofield was to dig the cellar and lay up the walls. Coons & Pearson entered upon the performance of the work under the contract, but the building was not completed by the first of December. They continued to work on the house after that date and until the eighth of January, when their hands quit work and refused to work any longer, as Coons & Pearson had become insolvent and unable to pay them. Scofield required numerous changes in the work, whereby a large amount of extra work was required to be and was done by Coons & Pearson. Scofield made no objection to Coons & Pearson continuing work on the house after the first of December, but acquiesced in the same. When Scofield was informed that Coons & Pearson had ceased work on the house he applied to one of them, Coons, to know whether they designed to continue the work, and Coons told him they did not. Scofield then asked Coons if he might go on and finish the house, and Coons consented. Scofield accordingly employed men and completed it.

The plaintiff and others, who had furnished materials for said house to Coons & Pearson, filed liens, under chapter 489 of the Laws of 1873.

The extra work done by the contractors amounted to \$1,263.90. The referee allowed for the completion of the work and some other items \$199.20, and found that Scofield had paid the contractors before the filing of the liens \$4,290, leaving a balance of \$374.70. For this balance the referee directed judgment.

On the trial Coons, one of the contractors, was examined as a witness on the part of the plaintiff. He gave evidence tending to prove that he and his partner did not abandon the work nor consent to allow Scofield to finish the build-

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Opinion of the Court, per EARL, J.

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ing, and he was asked by plaintiffs' counsel whether the persons having filed liens had offered them assistance on the Monday after the workmen had ceased to work on the building. The defendant's counsel objected to the question. The objection was overruled and the witness answered that they had, to which defendant's counsel duly accepted.

After the plaintiff rested, defendant's counsel moved for a nonsuit, on the grounds :

That plaintiff was not entitled to recover, for the reason that the contractors never completed the building and no valid reason was shown for not completing it.

And that plaintiff had not shown that the materials furnished by him to the contractors, and used by them in the construction of the house, were furnished with knowledge or consent of the owner.

The motion was denied and the defendant's counsel excepted.

*William S. Briggs* for the appellants. Plaintiff was bound, in order to recover, to show that the materials in question were furnished by him to the contractors with defendants' knowledge or consent. (Laws of 1873, chap. 489, § 1; *Mushitt v. Silverman*, 50 N. Y., 362.)

*Morris Brown* for the respondent. A material-man is entitled to a lien when the materials were furnished to one having a contract with the owner. (*Nellis v. Bellinger*, 6 Hun, 560.)

EARL, J. The plaintiff claims his lien under the act chapter 489 of the Laws of 1873. Section 1 of the act provides that "any person who shall hereafter perform any labor in erecting, altering or repairing any house, building, or the appurtenances, etc., or who shall furnish any materials therefor, with the consent of the owner," shall, on compliance with the act, have a lien for the value of such labor and materials.

The claim is made by the owner that the materials were

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Opinion of the Court, per EARL, J.

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not furnished with his consent. He had made a contract with Coons & Pearson to erect the house, they doing all the work, and furnishing all the materials. And the materials furnished by the plaintiff were such as were called for by this contract. The owner having made a contract for the use of these materials in the erection of the building, must be held to have consented that they should be furnished within the meaning of the act. The act gives a lien in the case of materials furnished to a contractor or sub-contractor, and it cannot be supposed in such case, the express consent of the owner is required. In the absence of any objection in such case, his consent must be inferred.

It is also claimed that the plaintiff should have been defeated, for the reason that the contractors failed, without sufficient excuse, to complete the building. By the terms of the contract, they were to complete the building by the first day of December. They were required to do considerable extra work, and continued, with the knowledge and approbation of the owner, to work upon the building until January eighth, when they failed in business, and their workmen discontinued work. The owner did not declare the contract forfeited, but as the referee found, obtained their consent that he might go on and finish the building. They consented, and he finished the building. In such a case, where the contractors have nearly completed their contract, and several hundred dollars have been earned, but not paid, before the owner can claim that the contract was forfeited, he must show that in some way he claimed the forfeiture, and thus distinctly put the contractor in default. It was a just inference, from all the facts in this case, that the owner undertook to complete the building at the expense of the contractors. This view was justified by the evidence, and we cannot disturb the finding of the referee.

The evidence of Robert Coons objected to was wholly immaterial, and could not have harmed the defendants, and hence the exception to the ruling admitting it furnishes no ground for a reversal of the judgment.

It will thus be seen that upon the merits the judgment is

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Statement of case.

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right. But the appeal must be dismissed. The judgment for plaintiff is only \$411.18, exclusive of costs, and hence under the act chapter 322 of the Laws of 1874, is not appealable to this court. We have held that an action to foreclose a mortgage is not, within the meaning of that act, an action "affecting the title to real estate, or an interest therein," and the same must be true of an action to foreclose a lien under the lien laws. Such an action is simply to enforce the collection of a money demand out of real estate, and no more affects the title than the attempt to enforce the collection of any debt against the debtor's estate. The real estate may be taken, but the action itself does not affect, determine or change any title.

The appeal must be dismissed, with costs.

All concur.

Appeal dismissed.

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HARRIET ARNOT, Executrix, etc., et al., Respondents, v. THE  
ERIE RAILWAY COMPANY, Appellant.

Defendant, in pursuance of an agreement with the B. H. and E. R. R. Co., guaranteed the payment of the interest coupons to the bonds of the latter corporation, a written guaranty thereof being indorsed upon each bond. Defendant subsequently became possessed of said bonds and transferred a portion of them, with the coupons and guaranties, to plaintiffs' testator for value. In an action upon the guaranties, *held* (ALLEN, J., dissenting), that, even if the guaranties when made were *ultra vires*, and therefore not binding, defendant having transferred the bonds with the guaranties thereon uncanceled, it was to be presumed that they were intended to be, and were, taken by the purchaser as additional security and as part of the purchase; that they were to be treated as if written at the time of the transfer; and, so treating them, it was immaterial that the true consideration was not expressed therein. Also, *held*, that it was immaterial that the above view was not taken by the trial court, or that it rests upon facts not specifically found; that, being based upon undisputed facts and just inferences therefrom, it was permissible in support of the judgment.

(Argued April 26, 1876; decided November 21, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiffs entered upon the decision of the court at Special Term. (Reported below, 5 Hun, 638.)

This action was brought upon certain alleged guaranties executed by defendant indorsed upon the bonds of the Boston, Hartford and Erie Railroad Company.

In October, 1867, defendant and the said The Boston, Hartford and Erie Railroad Company entered into a contract whereby the former agreed to guaranty the payment of interest upon a certain amount of the bonds of the latter in consideration of the latter constructing a road connecting the roads of the two companies, and agreeing to conduct the business passing from one road to the other on joint account.

Under this agreement the latter company issued its bonds of \$1,000 each, with interest coupons or warrants attached, both negotiable. Indorsed upon each was a guaranty in the following form :

“In consideration of the provisions of a contract of even date for the use of the Boston, Hartford and Erie railroad by the Erie Railway Company, the Erie Railway Company hereby agrees with the holder of this bond that the several interest warrants hereto attached shall be paid as they respectively mature.

“Witness the seal of the Erie Railway Company and the signature of its secretary, at the city of New York, the 8th day of October, 1867.

“HORATIO N. OTIS, *Secretary.*”

Defendant subsequently became possessed of all these bonds, and those in question in this action were transferred to John Arnot, plaintiffs' testator. The circumstances under which he acquired title and further facts pertinent to the question presented are set forth sufficiently in the opinion.

*W. W. Magfarland* for the appellant. Corporations have only such powers as are expressly conferred upon them by law and as are incidental to the principal authority and neces-

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sary to its due execution. (*Leavitt v. Palmer*, 3 N. Y., 19; *Talmage v. Pell*, 7 id., 328; *People v. Utica Ins. Co.*, 15 J. R., 358; *N. Y. F. Ins. Co. v. Sturges*, 2 Cow., 664; *N. Y. F. Ins. Co. v. Ely*, id., 678; *Bard v. Chamberlain*, 3 Sand. Ch., 31; *Cutskill Bk. v. Gray*, 14 Barb., 471.) In all actions by or against a corporation founded on an executory contract the defence that it is *ultra vires*, in the sense that the corporation had no authority of law to enter into it, is open to either party. (3 N. Y., 19; *Abbott v. B. and C. Stbt. Co.*, 1 Md. Ch., 542; *Green v. Seymour*, 3 Sand. Ch., 285; *White v. Franklin Bk.*, 22 Pick., 181; *L. and F. Ins. Co. v. Mechs. F. Ins. Co.*, 7 Wend., 31; *N. R. Ins. Co. v. Lawrence*, 3 id., 483; *Bangor Boom Co. v. Whiting*, 29 Me., 123; *Root v. Goddard*, 3 McL., 102; *Orr v. Lacy*, 2 Doug., 230.) The alleged guaranty not being within the express or implied authority of defendant's company was void and cannot be enforced. (*Root v. Goddard*, 3 McL., 102; *M., etc., Assn. v. Meriden Agency*, 24 Conn., 159; *Fisher v. N. Y. C. and H. R. R. Co.*, 46 N. Y., 653; *Midland R. Co. v. G. W. R. Co.*, 8 Oh. App., 841; *Pearce v. M. and I. R. R. Co.*, 21 How. [U. S.], 441; *Zabriski v. Cleve., etc., Co.*, 23 id., 398; *Coleman v. E. C. Co.*, 10 Beav., 1; *Berry v. Yates*, 24 Barb., 199; *M. Svgs. Bk. v. M. Ag. Co.*, 24 Conn., 159; *H. and N. H. R. R. Co. v. Crosswell*, 5 Hill, 383; *Wiley v. First Nat. Bk.*, 14 U. S. L. Reg., No. 6; *Stevens v. R. and B. R. Co.*, 29 Vt., 544; 7 N. Y., 328; *G. E. R. Co. v. Tanner*, 8 Oh. App., 152; *B. P., etc., Co. ex parte Grady*, 9 Jur. [N. S.], 631; *Albert v. Svgs. Bk. of Balt.*, 1 Md. Ch., 407; *Ohio L. Ins. Co. v. Mer. Ins. Co.*, 11 Humph., 1.)

*John Murdock* for the respondents. The contract between the Boston, Hartford and Erie Railroad Company and defendant was not *ultra vires*. (*Sutton's Hospital*, Coke R., part 10; *Brady v. Mayor, etc.*, 1 Barb., 590; *Leavitt v. N. Am. Bkg. Co.*, 5 id., 9; *Curtis v. Leavitt*, 15 N. Y., 219, 262; *Olcott v. Tioga R. R. Co.*, 27 id., 546; *Feeny v. People F. Ins. Co.*, 2 Robt., 599; *Barry v. Mech. Ex. Co.*, 1 Sandf.



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Ch., 280; *Ketchum v. City of Buffalo*, 14 N. Y., 375; *Town of Middletown v. R. R. Co.*, 43 How., 481, 489; Green's Brice's Ultra Vires, 38-40, and note; id., 318-336, and notes; *C. P. and I. R. R. Co. v. Ind. and B. R. Co.*, 5 McL., 450; 1 Den., 337; *Burle v. Eckart*, 3 N. Y., 132; Story's Con., 41, 48; Brice on Ultra Vires, 284, 291; Green's Ultra Vires, 327; *W. R. Co. v. G. W. R. Co.*, L. R., 8 Ch. App., 841; *Rich v. A. R. C. Co.*, L. R., 9 Exch., 224, 263; *Bissell v. M. S. and N. J. R. Co.*, 22 N. Y., 259; *Buffett v. T. and B. R. Co.*, 40 id., 168; *Parish v. Wheeler*, 22 id., 494; *Fisher v. N. Y. C., etc., R. R. Co.*, 46 id., 644, 653; *O. and L. C. R. R. Co. v. Vt. and C. R. R. Co.*, 6 T. & C., 489; *Zabriskie v. C., C. and C. R. R. Co.*, 23 How. [U. S.], 382; *Moss v. R. L. M. Co.*, 5 Hill, 137; *N. Y. F. D. Co. v. N. J. O. Co.*, 3 Duer, 648; *Akin v. Blanchard*, 32 Barb., 527; *Burtis v. B. and S. L. R. Co.*, 24 N. Y., 269; *Burchfield v. N. C. R. R. Co.*, 57 Barb., 589; *Carey v. C. and T. R. R. Co.*, 29 id., 57; *Root v. G. W. R. Co.*, 45 N. Y., 524; *Olcott v. Tioga R. R. Co.*, 27 id., 560; Laws 1851, chap. 19, § 28, sub. 6; Laws 1854, chap. 282, § 13; Laws 1855, chap. 302; *Town of M. v. R. and O. R. R. Co.*, 43 How., 490.) It was proper for defendant to guaranty the interest maturing on the bonds in question. (15 N. Y., 266, 267; *M. Bk. Assn. v. N. Y. L. Co.*, 35 id., 506; 27 id., 560; *Nelson v. Eaton*, 26 id., 410; *Parrish v. Wheeler*, 22 id., 494; 23 How. [U. S.], 382; G. B., Ultra Vires, 66, 115-123.) The presumption, in the absence of proof to the contrary, is that the bonds were not issued in violation of the terms of the contract. (*Akin v. Blanchard*, 32 Barb., 527; G. B., Ultra Vires, 40, 430; *Chautauqua Co. Bk. v. Risley*, 19 N. Y., 382.) The makers of the bonds are estopped from setting up a lack of power. (*Bissell v. M. S. and N. J. R. R. Co.*, 22 N. Y., 258; id., 494; *St. John v. Roberts*, 31 id., 441; *Bk. of Genesee v. Patchin Bk.*, 13 id., 315; *Erwin v. Downs*, 15 id., 576; *Cogill v. Am. Ex. R. R. Co.*, 1 id., 113; *Remsen v. Graves*, 41 id., 471; *Oakley v. Boorman*, 21 Wend., 588; *McKnight v. Wheeler*, 6 Hill, 492; 35 N. Y., 505; 27 id., 560; 25 id.,

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496.) The same rules governing other commercial paper are applicable to these bonds. (25 N. Y., 496; *Bk. of Rome v. Vil. of Rome*, 19 id., 20; *Welch v. Sage*, 47 id., 143; *Evertsen v. Nat. Bk. of Newport*, 4 Hun, 692; *Brown v. Leavitt*, 31 N. Y., 113; *Newman v. Frost*, 52 id., 422; *Youngs v. Lec*, 12 id., 554; *Day v. Saunders*, 37 How. Pr., 534; 27 N. Y., 560; 29 id., 220; 24 id., 269; 41 Barb., 25; 19 N. Y., 382; 35 id., 505; *Belmont Branch Bk. v. Hoge*, 35 id., 68; *Magee v. Badger*, 34 id., 249; 47 id., 143.)

EARL, J. It is not important to decide whether the Erie Railway Company could legally guaranty the payment of the bonds of the Boston, Hartford and Erie Railroad Company, under the arrangement made at the date of the bonds. Even if the guaranty, when made, was *ultra vires* and, therefore, not binding upon the defendant, there is sufficient reason for enforcing the guaranty upon the bonds in question.

In December, 1867, John T. Eldridge, who was at the time president of the Erie Railway Company, made an arrangement with John Arnot, plaintiff's testator, whereby Arnot delivered to him 3,200 shares of the capital stock of the company, he agreeing upon demand to deliver to Arnot an equal number of shares of the same stock, or at Arnot's option, to pay for the stock \$256,000; and also agreeing that Arnot should receive on the first days of January and July in the years 1868 and 1869, at the office of the Erie Railway Company in New York, the sum of \$11,200, being semi-annual interest on the par value of the stock at the rate of seven per cent. per annum. And to secure the performance of his agreement, Eldridge deposited with Arnot 320 bonds of the Boston, Hartford and Erie Railroad Company of the denomination of \$1,000 each, with the right to sell in case of breach of the agreement on the part of Eldridge. At the time of such deposit, there was upon each of the bonds the guaranty of the defendant dated October 8, 1867, as follows: "In consideration of the provisions of a contract of even date, for the use of the Boston, Hartford and Erie Railroad by the

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Erie Railroad Company, the Erie Railroad Company hereby agrees with the holder of these bonds that the several interest warrants hereto attached shall be paid as they respectively mature."

While Eldridge made this arrangement with Arnot in form in his individual capacity, there is some ground for saying that he was acting for the defendant and that the bonds pledged as collateral security, belonged to the defendant. But whether he was so acting or not, the defendant subsequently adopted the agreement with Arnot and agreed with Eldridge to purchase the bonds thus pledged and to pay Arnot the sum due him from Eldridge under the agreement above stated. And in December, 1868, the defendant made a contract with Arnot whereby it agreed that Arnot might have and hold as his own the 320 bonds, in consideration that Arnot would release Eldridge and the defendant from all liability on account of the contract made between Eldridge and Arnot under which the bonds were pledged. The arrangement in substance was, that the defendant transferred to Arnot and he accepted the absolute title to the bonds in full discharge of his claim of \$256,000, which the defendant had assumed and agreed to pay.

The defendant originally put its guaranty upon all the bonds issued by the Boston, Hartford and Erie Railroad Company for the purpose of giving them value and currency. It subsequently became the owner of all the bonds and it again issued some of them with its guaranty still remaining thereon. The guaranty was additional security for the same debt evidenced by the bonds and passed with the bonds. The purchaser of a bond would take the guaranty as part of his purchase although not mentioned.

It is undisputed that Arnot's claim was a valid one and that the defendant had become legally liable to pay it. It could pay it in cash or could give its own obligation to pay it. Instead of giving its own obligation, it could give the obligation of another which it owned, and guarantee its payment. (*Railroad Co. v. Howard*, 7 Wall., 392.)

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We must assume that the defendant intended to be liable upon its guaranty when it transferred the bonds, otherwise it would have erased it. Can we give effect to such intent? It intended to give Arnot these bonds and its guaranty that the interest warrants would be paid. There was then a sufficient consideration passing from Arnot to the defendant for the transfer of the bonds and for the guaranty, and we may treat the guaranty as if it was then written. So treating it, it matters not that the true consideration is not expressed. That is always open to explanation and variation by parol evidence. (*McCrea v. Purmart*, 16 Wend., 460; *Adams v. Heed*, 2 Denio, 306; *Brougham v. Weiderwax*, 1 N. Y., 509; *Murray v. Smith*, 1 Duer, 412; *Wheeler v. Billings*, 38 N. Y., 263; *Barker v. Bradley*, 42 id., 316.) If the guaranty was before void because supported by no valid consideration or made for no authorized purpose, it then became operative.

The transaction may be treated as if the company had said to Arnot: "Here are our bonds and here is our guaranty, take them in satisfaction of your claim." If that had been said, can it be doubted that the guaranty, resting upon a consideration then passing, would have been valid? It matters not that the view of the case here taken is one which may not have been taken by the judge at Special Term, and that it rests in part upon facts not specifically found. It is justified by undisputed facts and the just inferences from them, and is, therefore, permissible in support of the judgment.

The judgment must therefore be affirmed, with costs.

All concur, except ALLEN, J., dissenting; FOLGER and RAPALLO, JJ., absent.

Judgment affirmed.

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## Statement of case.

## GEORGE W. LOOMIS et al., Plaintiffs in Error, v. THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

Where two persons conspire together, fraudulently, to get possession of the money of another, with a felonious intent to convert it to their own use, and, by means of a fraudulent contrivance or device, succeed in inducing the owner to deliver the temporary possession thereof for a specific purpose, and then, without his consent and against his wishes, convert the same to their own use, they are guilty of larceny.

Upon the trial of an indictment for larceny, it appeared that Lewis, one of the prisoners, made the acquaintance of Olason, the prosecutor, and, under the pretence that he had a check for \$500 he desired to get cashed at a bank, invited Olason to go with him; he led him into a saloon, where was the prisoner Loomis, whom the evidence showed to be a confederate of Lewis. Lewis proposed to Loomis to throw dice; they did so for five dollars, and Loomis lost; they then proposed to throw for \$100. Lewis asked Olason to lend him ninety dollars, saying, "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and we will go up to the bank and get the check cashed and you can have the money." Olason let him have the ninety dollars; the dice were thrown and Lewis lost. Olason insisted on the return of his money; the purported check was then put up against \$100, and Lewis again lost; Loomis and Lewis thereupon went away. The court charged the jury, in substance, that if satisfied beyond a reasonable doubt that the two prisoners conspired fraudulently and feloniously to obtain the complainant's money, and to convert it absolutely without his consent and against his will, they could convict of larceny. *Held*, no error; and that the evidence was sufficient to sustain a conviction.

(Argued October 2, 1876; decided November 21, 1876.)

ERROR to the General Term of the Supreme Court in the first judicial department to review judgment affirming a judgment of the Court of General Sessions in and for the city and county of New York, entered upon a verdict convicting plaintiffs in error of the crime of larceny.

The prisoners were indicted for stealing the sum of ninety dollars, the property of Christian Olason. He was on his way from Nebraska to Hamburg, in Germany, and took the train from Philadelphia to New York, in the

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progress of his journey. The prisoners were passengers on the same train, and Lewis, one of them, engaged Olason in conversation soon after the train left the station, and continued in his company until they arrived in New York; there, at his suggestion, they both went to a boarding-house or hotel, known to Lewis, where he and Olason left their valises, and Olason also left a box he had. Then, at the instance of Lewis, they went out for a walk, and he informed Olason that he had a check for \$500 which he desired to have cashed, and went to a building he said was a bank for that purpose. This was before banking hours, and he told Olason that as the bank would not be open until half-past nine they would take another walk, which they did, and it ended by Lewis taking Olason into a saloon, where they found Loomis standing by the bar. Lewis then asked for two segars, for which he offered payment with a five dollar bill. The bartender could not change it, and the prisoners agreed to throw dice for the segars, which they did, and Lewis lost. Then they threw dice for five dollars, and Loomis lost it. Lewis proposed to divide that with Olason, but he declined to have any thing to do with it. Then Loomis put up what was called \$100, and Lewis had ten, and applied to Olason for ninety more, so that he could put up the same amount on his part, saying "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and we will go to the bank and get the check cashed, and you can have the money." Olason thereupon let him have the money. The dice were thrown, and the money won by Loomis. Olason demanded his money back; Lewis asked him to let him have \$100 more, which he refused. After that Loomis put up \$100 against what had been represented by Lewis as the check for \$500, and that was won by Loomis. Lewis then declared himself not worth a cent, and he and Loomis soon afterwards disappeared. Olason saw no more of them until after their arrest, which was made in a few days on the same train. Loomis was searched and found to have a package marked on the outside \$500, made up of a one dollar national currency bill, a five

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dollar note of the Citizen's Bank, a Confederate States twenty-dollar bill and pieces of brown paper inside. He had also five metal worthless pieces each representing a twenty dollar coin. And the other prisoner, Lewis, had a pack of three-card monte cards.

The prisoners' counsel asked the court to charge that there was not sufficient evidence to warrant a conviction. The court refused so to charge, and said counsel excepted.

The court charged, among other things, as follows :

"If you are satisfied from the evidence, beyond any reasonable doubt, that the two prisoners conspired fraudulently and feloniously to obtain the complainant's money and convert it absolutely to their own use without his consent, and that in pursuance of such conspiracy they did feloniously and fraudulently obtain from the complainant the ninety dollars by the means and in the manner and under the circumstances testified to by the complainant with the intention of converting the money absolutely to their own use without his consent and against his will, and that the complainant did not intend to part with his ninety dollars absolutely but only for a short time and only until Lewis could get the check or pretended check cashed, I think you can and ought to convict the prisoners of grand larceny, otherwise that you should acquit the prisoners."

To which the prisoners' counsel duly excepted.

*William F. Kintzing* for the plaintiffs in error. The court erred in charging the jury that they could convict the accused of larceny. (*Hildebrand v. People*, 56 N. Y., 396; *Smith v. People*, 53 id., 111; *McDonald v. People*, 43 id., 61; *Kelly v. People*, 13 N. Y. Sup. Ct. R., 509; *Wolfstein v. People*, id., 121; *Weyman v. People*, 11 id., 511; *Rex v. Hunt*, 8 Cox Cr. Cas., 495; *Lewer v. Comm.*, 15 S. & R., 93; Roscoe's Cr. Ev. [7th ed.], 626-636; Whart. Am. Cr. L. [5th rev. ed.], 1780; *Comm. v. James*, 2 B. & H. Ldg. Cr. Cas. [2d rev. ed.], 181, 204; 2 East's Pleas of Crown, 668; *Blunt v. Comm.*, 4 Leigh, 689; *Rex v. Jackson*, 1 Moody C. C., 119;

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*Mowery v. Walsh*, 8 Cow., 228; *Requa v. Barnes*, 2 Den. C. C., 59; *Reg. v. Thomas*, 9 C. & P., 741; *Reg. v. Adams*, 1 Den. C. C., 38; *Rex v. Adams*, R. & R. C. C., 225; *Rex v. Nicholson*, 8 East P. C., 669; 2 Leach, 610; 2 Russ. on Crimes [6th ed.], 35; Arch. Cr. Pldgs., 895; *Abrams v. People*, 13 N. Y. Sup. Ct. R., 491.) The intent to steal the goods must exist when it cometh to the hands or possession. (*People v. Wilson*, 39 N. Y., 460; *People v. Anderson*, 14 J. R., 294; *People v. Call*, 1 Den., 120; 3 Coke's Inst., 107; 1 Leach, 411; *Rex v. Leigh*, 2 East's Pleas of the Crown, 553, 694; *Rankin's Case*, R. & R., 44; 1 Hale's Pleas of the Crown, 504; 1 Hawk. P. C., chap. 33, § 2; 4 Black. Com., 232; Rose. Cr. Ev., 533, 541; Barb. Cr. L., 153; Whart. Am. Cr. L. [5th ed.], 1752; Arch. Cr. Pldgs., 186, 188; 2 Stark. Ev., 606.) There was no trespass in taking the property, and without it there could be no larceny. (*McDonald v. People*, 43 N. Y., 61; 56 id., 396; 1 Hawk. P. C., § 1, p. 208; 2 Russ. on Cr. [6th ed.], 35; *Reg. v. Middleton*, 12 Cox Cr. Cas., 269; 2 Bish. Cr. L. [5th ed.], 812; 1 Hale P. C., 504, 509; 1 Hawk. P. C., § 9, p. 209; 9 C. & P., 741; 38 E. C. L. R., 314.) There can be no larceny if there was intended to be either trust or confidence reposed in the accused. (56 N. Y., 396; 6 C. & P., 405; *Rex v. Oliver*, 4 Taunt., 274; *Rex v. Rodway*, 9 C. & P., 350; *Rex v. Patch*, 1 Leach, 748; *Nicholson's Case*, 2 id., 610.)

*Benj. K. Phelps*, district attorney, for the defendants in error. The plaintiffs in error were properly convicted of larceny. (*Smith v. People*, 53 N. Y., 111; *Hildebrand v. People*, 56 id., 394; *Kelly v. People*, 13 N. Y. Sup. Ct. R., 509; *Rex v. Horner*, 1 Lead. C. C., 270; *Rex v. Robson*, R. & R. C. C., 413; *Reg. v. Johnson*, 5 Cox C. C., 372.)

MILLER, J. The prosecutor was induced to place his money upon a game of hazard upon the assurance of Lewis, one of the prisoners, that he was to win, and he would have his money back, or that in case of loss other money would be procured



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upon a check which Lewis claimed to have in his possession, and paid in place of that lost.

It is evident that the prisoner Lewis and his confederate Loomis conspired fraudulently and feloniously to procure the money of the prosecutor, and by means of a trick and device succeeded in converting it to their own use. Upon the facts proven, the question to be determined is, whether a case of larceny is established. The jury have found that it was the intention of the prisoners to convert the money without the consent, and against the will of the prosecutor, and that he did not intend to part with his property. I think that the conclusion at which they arrived was abundantly warranted by the evidence, and the conviction of the prisoners can be upheld upon well-established legal grounds.

It is contended that the conviction was erroneous, because the prosecutor voluntarily parted with his money, not expecting to receive back the same bills, but others in their place, and hence the crime was not made out. It must be conceded that, in order to establish the offence of larceny, there must be a trespass, and without this element the offence is not complete. (1 Hawk. Pl. Cr., § 1, p. 108; 2 Russ. on Crimes [5th Am. ed.], 95; *McDonald v. The People*, 43 N. Y., 61; *Hilderbrand v. People*, 56 id., 394.) Even although the owner is induced to part with his property by fraudulent means, yet if he actually intends to part with it, and delivers up possession absolutely, it is not larceny. (*People v. Smith*, 53 N. Y., 111.)

In this case, considering the circumstances, it cannot be deemed, we think, that the prosecutor intended to part with the possession or the ownership of the money. It was handed over for a particular purpose, with no intention to loan it, or absolutely to surrender the title, and it was only in case of its loss that other money was to be procured upon the check, which the prisoner Lewis claimed to have in his possession. The prosecutor then had parted with no absolute right to the same, nor transferred any title to the bills before the contingency of the loss occurred, and the use of the money was but

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temporary, and for a specified object. Certainly, when it appeared that no loss had happened, the temporary possession was at an end, and to all intents and purposes the money reverted to the prosecutor. The alleged loss, brought about by the criminal and fraudulent conduct of the prisoners, could not change the title, or in any way transfer the ownership to them. They did not thereby acquire any right, and it cannot seriously be questioned that at this time, if not before, the prosecutor would have been justified in taking the money forcibly, or could have maintained an action for the recovery of the same identical bills. It was his money, and the conversion of it by the prisoners, before it was won, was without a semblance of lawfully authority, and, as the jury have found, with a felonious intent.

It was a clear case of larceny, as marked and significant in its general features as if the prisoners had wrongfully seized and appropriated it when first produced. The form of throwing the dice was only a cover; a device and contrivance to conceal the original design, and so long as there was no consent to part with the money, does not change the real character of the crime. While the element of trespass is wanting and the offence is not larceny, where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*, yet as is well said by a writer upon criminal law :

“It is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property, *and then converts it to his own use*. The act goes farther than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animus furandi*, avail himself of a temporary possession for a specific purpose, obtained by consent to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. He is, therefore, acting against

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the will of the owner, and is a trespasser, because a trespass upon the property of another is only doing some act upon that property against the will of the owner."

In the case at bar there was no valid agreement to part with the money absolutely, and no consent to divest the owner of his title. It was passed over for a mere temporary use at most, and the legal title remaining in the owner, the conversion of it by the prisoners within the rule cited was larceny. The reports are full of familiar illustrations of this rule, as a reference to some of the leading cases will show.

In *Hildebrand v. The People (supra)*, a fifty-dollar bill delivered to the prisoner to pay ten cents and return the change, was kept by him, and it was held to be larceny. It was intended that after taking out the ten cents other money should be exchanged, and to this extent and for this purpose the prisoner had lawful possession of the money. In that case, as here, the money was not absolutely parted with, but surrendered for a specific purpose and the custody temporarily transferred. It is true that in the case last cited, the delivery was held not to be complete until the change was returned, but that does not alter the principle when there was but a temporary possession, as there was no transfer of the ownership. (See, also, *McDonald v. The People, supra.*) Nor does it change the aspect of the case, when by trick or device the owner is induced to part with the custody or naked possession of property for a special purpose to one who receives it *animus furandi*, and still means to retain a right of property. (*Smith v. The People*, 53 N. Y., 111.) In *Rex v. Horner* (1 Leach, 305), where the prosecutor was decoyed into a public house and money obtained from him for the purpose of playing at cards, and appropriated by the prisoner, it was held that if there was a preconcerted plan to obtain the money, and an *animus furandi*, it was felonious. This case is analogous and directly in point, and it is difficult to draw any distinction between the case cited and the case at bar, as there was quite as strong ground for finding the felonious intent in the latter case as in that cited. In *Rex v. Robson* (R. & R., C. C., 413),

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where there was a plan to cheat the prosecutor out of his property under color of a bet, and he parted with the possession only to deposit it as a stake with one of the confederates, the taking was held to be felonious. This case is directly in point, and as a decision by the twelve judges is entitled to great weight. The cases referred to without citing others which bear in the same direction are sufficient to sustain the conviction, and the cases which have been cited as upholding the principle that there was no such parting with the property as to constitute larceny, do not, I think, go to the extent which is claimed. After a careful examination, without considering them in detail, suffice it to say, that perhaps a single exception (*Reg. v. Thomas*, 9 C. & P., 741), which was a *nisi prius* decision, and is criticised in the opinion in *Hildebrand v. The People*, they are all clearly distinguishable from the case now considered, and the weight of authority is decidedly in an opposite direction.

There is, to be sure, a narrow margin between a case of larceny and one where the property has been obtained by false pretences. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offence. In the former case, where by fraud, conspiracy or artifice, the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established. While in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretences. It will be observed that the *intention* of the owner to part with his property is the gist and essence of the offence of larceny, and the vital point upon which the crime hinges, and is to be determined. Although the present case is on the border line, yet it is quite clear that it was, as the evidence stood, a fair question for the jury to decide as to the intent of the prisoners feloniously to take the money, and as to the intention of the prosecutor to part with the ownership of the same.

These questions were fairly submitted by the judge to their

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consideration, and as there was no error in the charge, or in any other respect on the trial, the conviction must be affirmed.

All concur; RAPALLO, J., absent

Judgment affirmed.

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THE PEOPLE ex rel. WILLIAM H. VAN TASSEL, Appellant,  
v. THE BOARD OF SUPERVISORS OF COLUMBIA COUNTY,  
Respondent.

The provision of the "act to reduce the number of town officers," etc. (§ 26, chap. 180, Law of 1845, as amended by § 13, chap. 455, Laws of 1847), providing for the payment of the fees of magistrates and other officers for certain criminal proceedings by the towns or cities where the offence was committed, does not embrace the fees of a sheriff as jailer or otherwise. It was intended only to apply to the fees of local officers in preliminary criminal proceedings in cases under the grade of felony; not to affect the liability of a county for services of county officers after commitment, either for trial or upon sentence.

The accounts of a sheriff for receiving prisoners into and discharging them from jail, and for their board while confined therein, are properly county charges. (Tit. 1, art. 1, § 8, chap. 460, Laws of 1847; 1 R. S., 885, § 3.)

The liability of a county extends not only to such official services in cases strictly criminal, but includes also *quasi* criminal offences, such as violations of city ordinances, the only distinction being that, in the latter cases, instead of the statutory fee, the board of supervisors have power to fix the compensation.

Accordingly *held*, that the granting of a writ of *mandamus* was proper to compel a board of supervisors to audit the accounts of the county sheriff, as jailer, for receiving, discharging and boarding prisoners committed by the officers of a city for misdemeanors and violations of city ordinances.

*People ex rel. v. Board of Supervisors* (8 Hun, 275) reversed.

(Argued November 14, 1876; decided November 21, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department reversing an order of Special Term granting a writ of peremptory *mandamus* requir-

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Opinion of the Court, per CHURCH, Ch. J.

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ing defendant to convene and allow the account of relator, as sheriff and jailer of the county of Columbia, for receiving, discharging and boarding certain prisoners. (Reported below 8 Hun, 275.)

The facts are sufficiently set forth in the opinion.

*C. P. Collier* for the appellant. The charges of relator were proper and legal charges against the county. (3 R. S. [Banks' 5th ed.], 1050, 1051, § 22 [m. p.] 752, 1062; Crocker on Sheriffs, 418, 419; 2 R. S. [Edm. ed.], 780; *People ex rel. Hall v. Suprs. of N. Y.*, 32 N. Y., 473; 1 R. S. [Banks' 6th ed.], 927.)

*R. E. Andrews* for the respondent. No item of the relator's claim could be a county charge unless by provision of the statute. (*People ex rel. Kelly v. Haws*, 21 How. Pr., 122; *People ex rel. Hadley v. Suprs. of Albany*, 28 id., 22; *People v. Lawrence*, 6 Hill, 244.) Commitments, discharges or board are not a county charge in any case except misdemeanors and felonies. (1 R. S., 385, § 3; 2 id., 703, 726, 749, 753; Laws 1847, chap. 495, § 13.)

CHURCH, Ch. J. This was an application for a *mandamus* to compel the board of supervisors of Columbia county to provide for the payment of the relator's account as sheriff and jailer of the county. The contest relates to the sum of \$2,548.75, which is made up of items for receiving into and discharging from the jail 523 prisoners, and for the board of the same. The offences were for misdemeanors and violation of city ordinances, and all the commitments were by officers of the city of Hudson, and the offences were committed in that city. The board of supervisors decided that this account was a town and not a county charge, and hence that it must be audited and paid by the city of Hudson under the provisions of the charter. The Special Term granted the *mandamus*, and from the order an appeal was taken to the General Term, which latter court reversed the order, holding that the board

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Opinion of the Court, per CHURCH, Ch. J.

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was justified in rejecting the claim. There is no question as to the correctness of the account. The only question is, whether the account is a county or town charge, and this depends upon the construction to be given to the statute of 1845, chapter 180, as amended in 1847, chapter 495, section 3, which is as follows:

“ All fees and accounts of magistrates, and other officers for criminal proceedings, including cases of vagrancy, shall be paid by the several towns or cities wherein the offence shall have been committed, and all accounts rendered for such proceedings shall state where such offence was committed, and the board of supervisors shall assess such fees and accounts upon the several towns or cities designated by such accounts; but when any person shall be bound over to the Oyer and Terminer, or Court of Sessions, or committed to jail to await a trial in either of said courts, the costs of the proceedings had before the single magistrate shall be chargeable upon the towns or cities as aforesaid, *and the costs of the proceedings had after the person shall have been so bound over or committed shall be chargeable to the county*; but nothing herein contained shall apply to cases of felonies, nor where the proceedings or trial for the offence shall be had before any Court of Oyer and Terminer or Court of Sessions of the county, and the fines imposed and collected in any such cases shall be credited to said towns or cities respectively.”

I have examined the opinions of the General and Special Term, and the elaborate briefs of the respective counsel, and have arrived at the conclusion that this act does not embrace the fees of the sheriff as jailer or otherwise, and that the account presented is a county charge.

The Revised Statutes require the keepers of county prisons to receive and safely keep any person duly committed to their custody for safe-keeping, examination or trial, or duly sentenced for imprisonment in such prison upon conviction for any contempt or misconduct, or for any criminal offence; and it provides that prisoners detained for trial, and those under sentence, shall be provided with food *at the expense of the*

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Opinion of the Court, per CHURCH, Ch. J.

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*county.* (2 R. S., 780 [Edm. ed.].) The statute also declares what shall be county charges.

First. The compensation of sheriffs for commitments and discharges of prisoners in criminal process, within their respective counties.

Second. Expenses necessarily incurred in the support of persons charged with or convicted of crimes and committed therefor to the several jails of the counties.

Third. Moneys expended by any county officer in executing the duties of his office. (1 R. S. [Edm. ed.], 358.)

By these provisions the account of the relator was properly chargeable to the county. We think that the language of the act of 1847, above quoted, "all fees and accounts of magistrates, and other officers, for criminal proceedings," does not include the fees of the sheriff as jailer of the county. The legislature intended that the fees of magistrates and other local officers, for costs in preliminary criminal proceedings, in cases under the grade of felony, should be a town charge; but there is nothing in the act evincing a design to change the liability of the county for services of county officers after commitment, either for trial or upon sentence. The act itself excepts costs of proceedings after the prisoner is bound over for trial, thus confirming the view that the legislature intended to restrict its operation to the preliminary proceedings before the local magistrate, and the execution of a sentence by imprisonment cannot be regarded a criminal proceeding, within the meaning of the act, and it is quite clear that the fees and accounts of the magistrate and other like officers do not include the fees of the sheriff in receiving, discharging and boarding prisoners under sentence in the county jail.

It is urged that some of the items were not for strictly criminal offences, but they were all for criminal offences proper or *quasi* criminal offences, such as violations of city ordinances and the like, and as to the latter the only consequence would be that instead of the statutory fee for the services rendered, the board of supervisors would have power to fix the compensation for the service which the sheriff was



## Statement of case.

obliged to perform. It is about thirty years since the passage of the act, which, it is claimed, changes this account to a town charge, and it is believed that the practice has generally been in accordance with the views herein expressed.

The rule should be uniform throughout the State, and if the change claimed is desirable, the remedy is with the legislature.

The order of the General Term must be reversed and that of the Special Term affirmed.

All concur.

Ordered accordingly.

THE PEOPLE ex rel. WILLIAM E. DEMAREST et al., Appellants, v. CHARLES S. FAIRCHILD, Attorney-General, etc., Respondent.

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141 337

Under the provisions of the Code (§ 432) authorizing actions in the nature of a *quo warranto* to try the title to office, no positive duty is imposed upon the attorney-general to bring an action upon request of a party claiming office from which he is expelled, but it is a matter within his discretion, and the courts cannot sit in judgment upon his exercise thereof or coerce his action.

Accordingly, *held*, that a *mandamus* would not lie at the instance of a claimant to an office to compel the attorney-general to commence such an action.

No superior right to compel action on the part of the attorney-general is given by the fact that the incumbent of the office holds under a law attempting to abrogate the form of government of a municipal corporation, and to create a new one; which law is claimed by the contestant to be unconstitutional: The attorney-general cannot be compelled to bring an action to settle that question.

(Argued November 14, 1876; decided November 21, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department affirming an order of Special Term, which denied a motion for a writ of peremptory *mandamus*. (Reported below, 8 Hun, 334.)

The relators alleged that they were duly elected aldermen

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Opinion of the Court, per ALLEN, J.

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and assistant aldermen of the city of New York, pursuant to the city charter, and took the oath of office; that the boards of aldermen and assistant aldermen duly organized as such, but that the mayor refused to recognize them; that the act chapter 335 Laws of 1873 abolishing the board of assistant aldermen and establishing what is termed the minority system of electing the board of aldermen was unconstitutional; that Samuel Lewis and others, claiming to have been elected aldermen under said act, organized themselves as a board of aldermen, were recognized by the mayor, and are pretending to discharge the duties of the office, and that the attorney-general has refused to bring an action to determine the title to the office. The motion was for a writ of *mandamus* requiring him to commence and prosecute such an action.

*W. S. Wolf* for the appellants.

*Charles S. Fairchild*, attorney-general, in person. Whether this action should be brought rested in the discretion of the attorney-general alone, and is subject to no control. (*People ex rel. Peabody v. Attorney-General*, 22 Barb., 114; Code, §§ 430-432.)

ALLEN, J. The language of the statute authorizing actions in the nature of a *quo warranto* to try the title to office is very guarded and does not give the action as of right to every individual who may think that an office to which he has been legally chosen or appointed, has been usurped by another or who may volunteer to become an informer. It says, the action "may be brought by the attorney-general" upon his own information or upon the complaint of any private party. (Code, § 432.) Prior to the Revised Statutes leave of the Supreme Court was required for the institution of proceedings of this character. (1 R. L., 108, § 4.) Under that system, the court in this State exercised a sound discretion in granting or withholding leave to file an information in the nature of a *quo warranto*. (*People v. Sweeting*, 2 J. R., 184.) A like

## Statement of case.

EDWARD C. WILSON et al., Executors, etc., Respondents, v.  
FRANCIS M. RANDALL, Appellant.

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108 550

67 338  
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While the circumstances surrounding the execution of a contract cannot be used to contradict what is expressed therein, this rule does not confine the court in construing a contract to the very instrument in question; other contemporaneous writings between the parties, relating to the same subject-matter, are admissible in evidence to explain or qualify the agreement under consideration.

Defendant and plaintiffs' testator, W., contracted for the sale, by the former to the latter, of a certain piece of land. The contract, after describing the land by metes and bounds, thus continues: "containing fifty-four fifteen-hundredths acres of land, be the same more or less, for the sum of three hundred and fifty dollars per acre," which W. agreed to pay. When the deed was executed, defendant claimed that the surveyor had made a mistake, that there was in fact fifty-six fifteen one-hundredths acres; the purchase-price for that quantity at the agreed price per acre was inserted as the consideration in the deed, and was paid by W. Following the description in the deed were the words, "containing fifty-six and fifteen one-hundredths acres of land, be the same more or less." There was, in fact, but forty-eight forty-seven one-hundredths acres in the piece. In an action to recover back the payment in excess of the purchase-price of the actual quantity, *held*, that taking the contract and deed together, it appeared that the sale was by the acre, not by the piece, and that plaintiff was entitled to recover.

*Fauve v. Martin* (7 N. Y., 210) questioned.

(Submitted November 14, 1876; decided November 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiffs entered upon a decision of the court at Special Term. (Reported below, 7 Hun, 15.)

This was an action to recover back a sum alleged to have been overpaid by mistake by plaintiffs' testator, Edward J. Wilson, upon the purchase by him of a piece of land of defendant.

Prior to October 9, 1868, plaintiffs' testator and defendant entered into negotiations for the purchase by the former of the latter of a piece of land. They finally agreed upon the

## Statement of case.

boundary lines and upon the price per acre, *i. e.*, \$350, and a survey thereof to ascertain the quantity was to be made by defendant. A surveyor was agreed upon who was defendant's agent. He made the survey and reported that there were fifty-four acres and fifteen-hundredths of an acre within the boundaries agreed upon. A written contract was accordingly executed, dated the day aforesaid, in which, after a description of the land by metes and bounds, was the following: "Containing fifty-four and fifteen one-hundredths of an acre, be the same more or less, for the sum of \$350, which the said party of the second part agrees to pay," etc. In pursuance of the contract a deed was executed and delivered. Prior thereto defendant notified Wilson that there was a mistake in the survey, that there was in fact fifty-six and fifteen one-hundredths acres within the boundaries, and the consideration inserted in the deed, \$19,652.50, was arrived at by multiplying that number of acres by the price per acre so agreed upon. In the deed, after a description of the land by metes and bounds, it is stated as "containing fifty-six acres and fifteen one-hundredths of an acre of land (56 15-100), be the same more or less." The consideration, as so arrived at, was paid by Wilson in accordance with the terms of the contract. There were in fact, as was afterwards ascertained, but forty-eight and forty-seven one hundredths acres of the land.

The trial court found, as conclusions of law, that the purchase was by the acre; that the plaintiff was entitled to recover back the sum paid in excess of the price of the actual number of acres at the agreed price per acre. Judgment was perfected accordingly. Further facts appear in the opinion.

*Stephen S. Marshall* for the appellant. The sale was a sale in bulk, and not by the acre. (*Faure v. Martin*, 13 Barb., 394; 7 N. Y., 210.)

*Michael Nolan* and *B. Rush Stoddard* for the respondents. Evidence as to what was said and done prior to the execution of the written contract, and before the execution of

the deed, was proper. (1 Greenl. Ev., §§ 277, 282, 286; *Blossom v. Griffin*, 13 N. Y., 569; *George v. Tallman*, 5 Lans., 392.)

ANDREWS, J. It was found by the court as a fact, and the oral testimony of the negotiation prior to the execution of the contract of sale leaves no room for doubt, that the intention of both parties was that the purchase and sale of the land should be by the acre, and that the amount of the purchase-money should be computed on the actual quantity of land by measurement at the price of \$350 an acre. There was no proposition that the sale should be for an entire sum irrespective of quantity, but the proposition was to sell the land by the acre, and the execution of the contract was delayed by a disagreement between the parties as to the price per acre, and after that was agreed upon, there was a further delay to enable an estimate to be made by a surveyor to ascertain the quantity of land.

The plaintiff assented to the estimate being made by a surveyor named, but he was the agent of the defendant. The duty to have a survey made, was by the agreement assumed by him, and the surveyor reported to the defendant that the land contained fifty-four and fifteen one-hundredths acres, and this amount was inserted in the written contract executed October 9, 1868. The contract after describing the lands by metes and bounds adds: "Containing fifty-four fifteen-hundredths acres of land, be the same more or less, for the sum of \$350 per acre," and then follows a covenant by the purchaser to pay the purchase-price, not, however, naming the aggregate sum. If the contract imports a sale of the land in bulk and not by the acre, or concludes the plaintiff from questioning the quantity specified, it disappoints the intention of both parties as indicated by the preliminary negotiation. The sale by the acre was the basis of the contract, and while both parties assented to a survey to ascertain the quantity, there was no suggestion that either was to be bound by the survey, and still less that the purchaser was to

take the risk of the quantity stated in the contract. But the intention of the parties to an agreement when it has been reduced to writing, is to be ascertained from the writing alone if there is no uncertainty in the meaning of the language employed, and evidence of prior oral negotiations or stipulations at variance with the written agreement, are inadmissible for the purpose of construction. The contract may be read in the light of surrounding circumstances, and if the language employed is uncertain and ambiguous, they may afford a key to the meaning and intention of the parties, but they cannot be used to contradict what is expressed. But the rule does not confine the court in construing a writing to the very instrument in question. Other contemporaneous writings between the parties relating to the same subject-matter are admissible in evidence to explain or qualify the agreement before the court. (Greenl. on Ev., §§ 277, 283.)

The land which the vendor in this case intended to convey, and which the vendee contracted to purchase, was clearly defined and the words "more or less," inserted in the contract, indicated that the quantity was or might be uncertain. When a contract is made to sell a defined piece or parcel of land for an entire piece, and following the description is a statement of the number of acres contained in the tract, without any covenant by the vendor as to the quantity, it is held that the statement of quantity is mere matter of description, and that the contract is satisfied by a conveyance of the land within the boundaries stated, whether it contains more or less than the specified number of acres. (*Mann v. Pearson*, 2 J. R., 37.) And if the words "more or less" are inserted, it is still more clear that the quantity was not of the essence of the contract.

In *Faure v. Martin* (7 N. Y., 210), where the agreement was to sell a certain farm containing "ninety-six acres, be the same more or less, for the sum of sixty dollars per acre," which, in fact, contained but eighty-six acres, and a deed was given with the same description, it was held that in the absence of fraud, mistake or representation, the vendee was not

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Opinion of the Court, per ANDREWS, J.

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entitled to compensation for the deficiency. The same rule of construction was applied as in the case of *Mann v. Pearson*, and the court were of opinion that the words "more or less" inserted in the description, indicated that the parties did not rely upon the statement of quantity, and that the purchaser was bound to pay for ninety-six acres at the price of sixty dollars an acre. This case was commented upon by COMSTOCK, J., in *Belknap v. Sealey* (14 N. Y., 143), and the construction given to the contract in *Faure v. Martin*, is, at least, very strict in favor of the vendor, and we are not fully satisfied that it was the true interpretation of the agreement. Where a contract is to sell a farm at a certain price per acre, and following the description is a statement of the number of acres and the words "more or less," may it not mean that the quantity when ascertained, whether "more or less" than that specified, shall be paid for at the price per acre mentioned in the agreement. In this case, however, the deed executed by the vendor two months after the contract was made, and which it is admitted was executed in "pursuance of the contract and in fulfillment thereof," conclusively determines its construction. The deed describes the land by metes and bounds as in the contract, but following the description are the words "containing fifty-six and fifteen one-hundredths acres of land be the same more or less," while the clause in the contract is "containing fifty-four and fifteen one-hundredths acres," etc. The consideration expressed in the deed is computed on fifty-six and fifteen one-hundredths acres at \$350 an acre. When the deed was executed the defendant represented to the plaintiff that the surveyor had made a mistake in his computation, and that there were two acres more than were stated in the contract, and the plaintiff thereupon paid for the two additional acres at the contract price. Both parties at this time assumed that the sale was by the acre, and that the contract bound the plaintiff to pay for the actual quantity at the rate of \$350 an acre.

This construction is binding upon the defendant and he cannot now be permitted to deny it. Moreover, taking the

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Statement of case.

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contract and deed together, it appears that this construction was the true one, and both instruments may, we think, be considered in construing the contract. The contract of October 9, 1868, is, therefore, to be regarded as a contract to sell the land embraced therein by the acre, at the price specified. The land contains but forty-eight acres and twenty-seven perches. By mistake induced in whole or in part by the untrue though not fraudulent representation of the defendant, the plaintiff has paid for fifty-six and fifteen one-hundredths acres, and the mistake was not known to him until after the conveyance was executed. It is very just that under these circumstances the plaintiff should recover back the money paid for the land in excess of the actual quantity, and the law, we think, justifies the recovery in this case. (*Sir Cloudsley Shovel v. Bogan*, 2 Eq. Cas. Abr., 688; *Tarbell v. Bowman*, 103 Mass., 341; 1 Sugden on Vend., 324; See also *Belknap v. Sealey*, 14 N. Y., 143, and cases cited.)

The judgment should be affirmed.

All concur.

Judgment affirmed.

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JOHN B. IRELAND, Executor, etc., Appellant, v. ISRAEL CORSE et al., Executors, etc., Respondents.

The will of I. appointed three executors and directed that one of them should "receive a commission of six per cent upon all moneys collected by him." *Held*, that this did not entitle the executor to the commission on the entire proceeds of the estate, or upon all sums received by the executor, but only on collections, giving the word its ordinary meaning

(Argued November 14, 1876; decided November 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a decree of the surrogate of the county of New York on the final accounting of the executors of Andrew L. Ireland, deceased.



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Statement of case.

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The fourteenth clause of the will of deceased provided as follows :

" I hereby nominate and appoint Israel Corse, Esquire, my grand nephew, William Johnson, Esquire, and John B. Ireland, Esquire, executors and trustees of this my will, and I further direct that said John B. Ireland shall receive a commission of six per cent upon all moneys collected by him."

The testator died seized of a large amount of real estate and of personal property. The will directed the real and personal estate to be converted into money, and the appellant claimed that he was entitled to six per cent, under the clause of the will above quoted, upon all the proceeds of such conversion. The auditor, to whom the settlement of the estate was referred by the surrogate, found on this question that the appellant, Mr. Ireland, was entitled to receive six per cent upon moneys actually collected by him, and that the testator did not intend that this commission should apply to any money except that arising from collections actually made. The surrogate overruled the exceptions taken to the auditor's report, and allowed to the appellant commission on the entire estate as executor under the statute, and as the auditor reported that he was unable to determine from the papers before him the precise amount which was actually collected by the executor John B. Ireland, and upon which he should receive a commission of six per cent, no such commission was allowed by the surrogate in said decree.

*Ira D. Warren* for the appellant. Plaintiff was entitled to six per cent upon the entire proceeds of the estate. (*Worcester's Dictionary*, 264; *Cromer v. Pinckney*, 3 Barb., Ch., 466; *Roosevelt v. Thurman*, 1 J. Ch., 220; *Mowatt v. Carow*, 7 Paige, 328; *In re Hattel*, 8 id., 375; *Hove v. Van Schaick*, 3 N. Y., 538; *Sherwood v. Sherwood*, 3 Bradf., 230; *Doe v. Brown*, 11 East, 441; 1 Redf. on Wills, 427; Rules, 16, 17.)

*Charles E. Miller* for the respondents. Plaintiff was not entitled to six per cent on the whole estate, but only upon the

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Opinion of the Court, per *Curiam*.

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rents and profits collected by him personally. (*Soverhill v. Suydam*, 50 N. Y., 142; 1 Redf. on Wills [2d ed.], 580, note.)

*Per Curiam.* The language employed in the fourteenth clause of the testator's will is not sufficiently comprehensive to entitle the appellant to a commission of six per cent upon the amount of the entire proceeds of the estate. Had the testator intended to make any such provision it must be assumed that he would have employed plain and intelligible terms which would clearly express such an intention. As he failed to do this, the construction of the clause in question must necessarily be restricted to the ordinary definition of the word which the testator has selected to convey his meaning. Having this in view, in no sense can the word "collected," which is incorporated in the clause referred to be interpreted as including all moneys received by the appellant as executor, or the entire avails of the estate which were realized. Even if the word thus employed could be regarded as applying to any portion of the testator's property, which came into the hands of the appellant, it cannot be held to comprehend more than it plainly imports. So far as the entire estate is concerned, it can have no effect, and as it is not made to appear distinctly that there was any portion of the estate received by the appellants, to which the word used was applicable, he was not entitled to the allowance of six per cent.

The decree was right, and must be affirmed, with costs.

All concur.

Judgment affirmed.

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LUCIEN R. BAILEY, Respondent, v. JOHN H. BERGEN, as  
Executor, etc., Appellant.

This action was brought upon a promissory note made by C. and indorsed for his accommodation by defendant's testator. The firm in which C. was a partner made an assignment for the benefit of creditors to plaintiff, giving preferences, defendant's testator being one of the preferred creditors. Defendant claimed that plaintiff had collected, as assignee, sufficient to pay the preferred debts. This claim was disputed and there had been no settlement of plaintiff's accounts, as assignee. *Held*, that defendant could not, in this action, compel an application by plaintiff of the funds in his hands, as assignee, toward the payment of the note; that the amount in his hands applicable for that purpose could only be determined by an accounting, and the assignee was entitled to have his entire account settled in one accounting, which should protect him against all the parties who could claim under the assignment; he could not be compelled to account separately to each creditor.

(Argued November 14, 1876; decided November 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment (except as to costs) in favor of plaintiff entered upon the report of a referee. (Reported below, 2 Hun, 520.)

This action was upon the indorsement by defendant's testator, Maria F. Bergen, of a promissory note for \$1,000, made by W. N. Cross, and upon which said Maria F. Bergen was an accommodation indorser.

The answer set up, among other things, that the note was made, indorsed and transferred to plaintiff in payment of, or as collateral security for, an antecedent debt of the firm of Cross & Wilson, of which firm the maker was a partner; that thereafter said firm made an assignment for the benefit of creditors to plaintiff, who accepted the trust; that under and by the assignment plaintiff and said Maria F. Bergen were preferred creditors, and that the assets collected and received by plaintiff were more than sufficient to pay in full all the preferred creditors. Upon the trial the assignment was produced and received in evidence. Plaintiff had given credit

Opinion of the Court, per *Curiam*.

on the note for \$422.31 received under the assignment. Defendant's counsel offered to prove, in substance, the allegation of the answer. The evidence was excluded, under objection and exception, and the referee directed judgment for the balance of the note. Judgment was perfected accordingly.

*John H. Bergen, Jr.*, for the appellant. Plaintiff having received the note from the maker acquired only such rights as he had. (*Hoge v. Lansing*, 34 N. Y., 136; *Cent. Bk. v. Hammett*, 50 id., 148.) The reversal, so far as costs were concerned, was correct. (2 R. S., 90; Code, §§ 41, 317; *Buckhart v. Hunt*, 16 How., 407; *Snyder v. Young*, 4 id., 217; *Van Vliet v. Burroughs*, 6 Barb., 341; 22 Wend., 571; *Fort v. Gooding*, 9 id.; 388; *Russel v. Lane*, 1 id., 519; *Bullock v. Bogardus*, 1 Den., 276; *Baggatt v. Bongler*, 2 Duer., 160; *Belden v. Knowlton*, 3 Sandf., 758; *Merritt v. Thompson*, 27 N. Y., 225; *Knapp v. Center*, 6 Hill, 386; *Mersereau v. Rogers*, 12 How., 301; *Woodruff v. Cook*, 14 id., 481; *Parkhill v. Stillman*, 12 id., 353; *Marsh v. Hussey*, 4 Bosw., 614.)

*Geo. Bowen* for the respondent. An action at law cannot be sustained by an individual creditor against an assignee for his proportionate share under the assignment until the sum he is entitled to receive has been ascertained by a proceeding binding on the trustee. (1 Wait's Pr., 116; Burr. on Assmts., 537; *Wakeman v. Grover*, 4 Paige, 23; *Rogers v. Rogers*, 3 id., 379.) The answer does not contain the proper allegations to entitle defendant to an accounting. (*Garvey v. Jarvis*, 54 Barb., 179.) Mrs. Bergen had no right to take any affirmative proceeding until she had paid the debt. (*Elwood v. Diefendorf*, 5 Barb., 398; *Jones v. East, etc.*, 21 id., 161, 176; *Powell v. Smith*, 8 J. R., 240.)

*Per Curiam*. The court is of opinion that the defendant cannot, in this action, compel the plaintiff to apply the funds in his hands, as assignee of Cross & Wilson, to the extinguishment of Mrs. Bergen's liability, as indorser of the note, upon

## Statement of case.

which the action was brought. If the accounts of the plaintiff, as assignee, had been settled and he had in his hands an admitted or established balance, it may be that, to avoid circuity of action, he could be compelled now to make the application. But such is not the case. The amount in his hands applicable to the indemnity of Mrs. Bergen, as indorser, is not admitted and can only be ascertained by an accounting of the assignee, and he is entitled to have his entire account as such settled in one accounting which shall protect him against all the parties entitled to claim under the assignment. He cannot be called upon to account separately to each creditor or class of creditors. If his account were settled, as between him and the estate of Mrs. Bergen in this action, other creditors would not be bound by such accounting. The claim which he is prosecuting is due to him in his own individual right. It is true that the executor of Mrs. Bergen, if he pays the claim, can compel the repayment to him of a *pro rata* share of the balance in plaintiff's hands, as assignee, when ascertained, but for the reasons before stated we do not think that balance can be ascertained in this action.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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HENRY COLTON et al., Executors, etc., Appellants, v. MARY A. Fox et al., Respondents.

67	348
131	61
181	337

The will of .P. after various specific legacies and devises, gave the residue of his estate, real and personal, to his executors in trust, to pay the income and profits to two brothers and two sisters of the testator, in equal proportion, during their joint lives, and, after their "several deaths," to divide the said residuary estate equally among their children. The provision closed thus: "In case either of my said brothers or sisters shall die, leaving the others surviving, then the income herein intended for the one or the other so dying shall be paid to the issue or the representative of the one or the other so dying." In an action for a construction of the will, *held*, that the design of the

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testator was, that the *corpus* of the estate should remain undivided in the hands of the executors until the decease of all of the brothers and sisters named; that the interests of the children of the respective brothers and sisters named did not vest in them at the death of the testator, but was future, and contingent upon their surviving the parent; and that the provision was in contravention of the statute against perpetuity, and so void.

*Everitt v. Everitt* (29 N. Y., 40) distinguished.

(Argued November 15, 1876; decided November 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order reversing a judgment entered upon a decision of the court at Special Term, and giving final judgment. (Reported below, 6 Hun, 49.)

The nature of the action and the facts appear sufficiently in the opinion.

*James Emott* for the appellants. Any construction of doubtful or apparently inconsistent clauses which will be in harmony with the general scheme of a will is resorted to, and availed of, to preserve its dispositions. (Roper on Legacies, 1460, 1461; *Sherratt v. Bentley*, 2 M. & R., 149; *Smith v. Pybus*, 9 Ves., 567; *Collet v. Lawrence*, 1 Ves. Jr., 268; 4 Kent's Com., 534; *Everitt v. Everitt*, 29 N. Y., 96.) The word "several" in the residuary clause of the will should be construed "respective." (*Woodcock v. Spillett*, 6 Sims., 416.) The children of each of the four brothers and sisters named in the will living when the testator died, each took a vested interest in the share of their parent for life, subject to be divested, *pro tanto*, to let in after-born issue, if any. (2 Jar. on Wills, 74, 76; *Titus v. Weeks*, 37 Barb., 136; *Everitt v. Everitt*, 29 N. Y., 39; *Jenkins v. Freyes*, 4 Paige, 47; *Dingley v. Dingley*, 5 Mass., 535; *Atty.-Genl. v. Criespin*, 1 Br. C. C., 386; *Devisme v. Weller*, *id.*, 537; *Middleton v. Messenger*, 5 Ves., 136; *Fox v. Fox*, 19 E. R. [Eq. Cas.], 285.)

*Nathaniel C. Moak* for the respondents. The devise in question was in controvention of the statute against per-

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petuity and so void. (*Jennings v. Jennings*, 7 N. Y., 548; *Hawley v. James*, 16 Wend., 61; *Kane v. Gott*, 7 Paige, 521; 24 Wend., 564; *Boynston v. Hoyt*, 1 Den., 53; *Chittenden v. Fairchild*, 41 N. Y., 292; *Converse v. Kellogg*, 7 Barb., 596, 597; 1 R. S., 723, § 15; id., 718, § 1; 3 Kent's Com., 378; 4 id., 373; *Coster v. Lorillard*, 14 Wend., 334; *Amory v. Lord*, 9 N. Y., 410; *Phelps v. Phelps*, 28 Barb., 121; 2 Wms. on Exrs., 1057-1059, 1067, 1068; Fearne on Con. Remainders, 554, note; *Collin v. Collin*, 1 Barb. Ch., 630; *Morton v. Morton*, 8 Barb., 18; *Doubleday v. Newton*, 27 id., 431; *Smelt v. Chase*, 2 N. Y., 80; 4 Kent's Com., 534 [rep.]; *Lynes v. Townsend*, 33 N. Y., 562, 563; *Leonard v. Bun*, 18 id., 106; *Phelps v. Phelps*, 28 Barb., 121; *Dodge v. Pond*, 23 N. Y., 69.) A possibility at the creation of a limitation that the event upon which it depends may exceed in point of time the authorized period is fatal to it. (16 Wend., 61; 7 N. Y., 547; 9 id., 403, 415; 23 id., 69; 1 Den., 53; *Bean v. Hockman*, 31 Barb., 78; *Brown v. Brown*, 34 id., 594; *Savage v. Burnham*, 17 N. Y., 561; 29 id., 39; *Portage v. Howe*, 30 Barb., 312; *Mason v. Jones*, 2 id., 242; *Post v. Hover*, 33 N. Y., 593; *Banks v. Phelan*, 4 Barb., 80; *Taylor v. Gould*, 10 id., 388; *Thompson v. Thompson*, 28 id., 432; *Knox v. Jones*, 47 N. Y., 387; *Simpson v. Englis*, 4 Sup. C. R., 80; *Jones v. Van Schaick*, 20 Wend., 564; *Gott v. Cook*, 7 Paige, 521; *Thompson v. Carmichaels*, 1 Sand. Ch., 387; *Schittler v. Smith*, 41 N. Y., 328; *Wood v. Wood*, 5 Paige, 596; *Thorn v. Coles*, 3 Ed. Ch., 330; *Westerfield v. Westerfield*, 1 Bradf., 137; *Vail v. Vail*, 7 Barb., 226; *Portage v. Howe*, 30 id., 312; *Mason v. Jones*, 2 id., 342; *Meseroll v. Meseroll*, 3 Sup. C. R., 192; *Harrison v. Harrison*, 36 N. Y., 543.)

CHURCH, Ch. J. This action is brought to obtain a construction of the eighth clause of the will of Reuben Parsons, which is as follows :

"Eighth. I give, and devise, and bequeath all the rest, residue and remainder of my estate, both real and personal.

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to my executors hereinafter named, or the survivors or survivor of them, upon the following trusts, namely: To pay the income, rents, issues and profits thereof to my brothers Roswell Parsons and William Parsons, and to my sisters Fidelia Marcy and Nancy Charles, equally, share and share alike during the joint lives of my said brothers and sisters, and after the several deaths of my said brothers and sisters, then to divide the said real and personal estate equally among the children of my said brothers and sisters, respectively; the said children to take the parent's share. And I hereby expressly declare that in case either of my said brothers or sisters shall die, leaving the others surviving, then the income herein intended for the one or the other so dying, shall be paid to the issue or representative of the one or the other so dying."

The validity of this trust is challenged by two sisters of the testator, of the half blood, upon the ground that it suspends the power of alienation and absolute ownership beyond the period of two lives.

The provision is not drawn with legal accuracy upon any view of it, but it must be construed according to the rules established in such cases. The intention of the testator must be ascertained and the will construed accordingly, if practicable, and when the construction is determined, that is, when it is ascertained what disposition the testator intended to make of his property, the question then is, whether such disposition is in accordance with the law of the State. It is not disputed but that the purposes of the trust are lawful. The single inquiry is whether it violates the statutes against perpetuity.

After a careful examination we feel constrained to concur with the judgment of the General Term that the trust is invalid.

By the first paragraph, standing alone, the trust would cease upon the death of either of the beneficiaries, but when read in connection with the two following paragraphs, it seems quite apparent that the scheme and design of the testator was that the *corpus* of the estate should remain undivided in the



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hands of the executors, until the four brothers and sisters died, and "then" to divide the property between their respective children, and that in the event of the death of one or more of the brothers and sisters, the income intended for the one or more so dying, should be paid to his or her or their children, until the decease of all the brothers and sisters. The second paragraph expressly declares that the division shall take place after the "several" deaths of the brothers and sisters. The claim that the word "several" should be construed "respective" cannot be maintained with propriety. Such a construction would require the division of the whole property upon the death of one of the *cestuis que trust*, when it is evident and conceded that the testator intended that all of them should enjoy the income, etc., during their respective lives, and, besides, the plain meaning of the provision is that whenever the division is made it must be made between all the children of the four, and not between the children of the one or more who may die leaving survivors. The last paragraph makes the whole design still more apparent. It provides that upon the death of each of the brothers and sisters the income intended for the one so dying shall be paid to his or her children, thus repelling the idea that the principal or *corpus* is then to be paid.

I do not think that these paragraphs can be regarded as repugnant to each other in such a sense as to require or justify the striking out of either. They must be read together, and words and sentences apparently inconsistent must be construed as qualifying or modifying each other. There was not a perfectly accurate use of words, but taken together, the intention of the testator is very manifest.

The position of the learned counsel for the plaintiffs that the interests of the children of the respective brothers and sisters vested in them at the death of the testator, is not, I think, tenable. The case of *Everitt v. Everitt* (29 N. Y., 40) is relied upon to establish that position. The interests of the children were held to be vested in that case from the force of provisions not found in this will. These provisions required

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the payment to the children of portions of the principal upon certain contingencies, prior to the youngest becoming of age, when they were to receive the whole estate. From this, it was argued and decided that their interests must have been intended to be vested.

Here, in the first place, the title is in express terms vested in the executors, and there is no provision for paying any part of the *corpus* until the death of the four beneficiaries; in fact, as we have seen, the provisions of the will repel any such idea. The testator placed the title of this portion of his property in his executors, and directed that it should remain there until the death of four persons, with a limitation over to such of their children as should be living. It is a future interest or estate contingent upon surviving the four persons named.

DENIO, J., in *Everitt v. Everitt* (*supra*), says; "The leading inquiry upon which the question of vesting turns, is whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future and contingent, depending upon the beneficiary arriving of age, or surviving some other person, or the like."

Determined by this rule, the interests of the children in this case did not vest, but they were future and contingent, depending upon surviving all the specified brothers and sisters. It is unnecessary to consider whether, if the interests of the children were vested as claimed, the suspension by reason of the trust would not be unlawful.

The judgment must be affirmed.

All concur; MILLER, J., absent.

Judgment affirmed.

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CHARLES H. KALBFLEISCH et al., Executors, etc., Respondents,  
v. FREDERICK W. KALBFLEISCH, et al., Respondents, JOSE-  
PHINE M. L. FLEET, Appellant.

Where a testator, immediately after and in connection with, a provision in his will for certain of his children, makes a gift to his other children, speaking of them as a specified number, which is less or greater than the number in existence at the date of his will, the number will be rejected on presumption of a mistake, and all the other children will be entitled to share in the gift, unless from other portions of the will it can be inferred that all were not, and who were the particular children intended.

K., at the time of making his will, had nine children, all of whom survived him. By his will he gave to five of his children pecuniary legacies for life, with remainder to their issue, to his daughter J. he gave certain specified real and personal property. He then, by the fifth clause of his will, gave to the remaining three children certain real estate, "subject, however, to the payment of \$118,000 to the other *eight* of my children," to be secured by bond, and by mortgage on the real estate devised. He devised to his son F. certain real estate, subject to the payment of \$15,000 to his executors. By the ninth clause of his will he declared it to be his intention that the said \$118,000 and \$15,000 "shall make part of the amount specifically devised to my children, and shall not be considered as additional or in excess thereof." In an action for a construction of the will, *held* (EARL, J., dissenting), that the word "eight," in the fifth clause, should be disregarded; and that, had there been no further expression of intent, the six "other children" would each take an equal share in the \$118,000 bond and mortgage; but that the express declaration of the testator's intent in the ninth clause, must govern, and this excluded his daughter J. from any share therein: First. Because the \$118,000 and the \$15,000 were alike affected, and were both to be a part of the "amount specifically devised," and J. confessedly had no claim to any part of the \$15,000. Second. Because a share in neither could be made part of an "amount specifically devised," where no money or security was given, but simply specific real and personal property; as moneys or securities could not become part of a piece of real estate, or of a certain chattel, and if received by the donee must be in addition thereto.

The testator devised and bequeathed his residuary estate to his nine children equally. By a codicil he authorized his executors to sell his real estate not specifically devised, and directed that the pecuniary legacies should not be paid over to the life tenants, but upon their decease, respectively, to their issue, they receiving only the income; no provision was made in the will for the payment of the testator's debts

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his personal property was much more than sufficient to pay them, but the residue, with the \$113,000 and the \$15,000 added, was insufficient to pay the pecuniary legacies. *Held*, that the intent of the testator was to charge the pecuniary legacies upon the residuary real estate, and to authorize the sale thereof, if necessary to make up the sum required for their payment.

(Argued November 10, 1876; decided November 21, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, reversing, in part, a judgment entered upon a decision of the court at Special Term.

This action was brought to obtain a construction of the last will and testament of Martin Kalbfleisch, late of the city of Brooklyn, deceased.

Said testator died in February, 1873, leaving a will dated January 18, 1873, and a codicil thereto dated February 4, 1873, both of which were duly admitted to probate.

The following is a copy of the material portions of the will :

"First. I devise to my daughter, Elizabeth W. Robinson, the house and lot on Pacific street, in the city of Brooklyn, where she now resides ; and I also devise and bequeath to the said Elizabeth, the sum of \$74,000, being the sum of \$100,000, after deducting the sum of \$12,000 for the house hereby devised to her, and the further sum of \$14,000, for a note now held by me against the husband of the said Elizabeth. The said house and lot, and the said sum of \$74,000 is hereby devised and bequeathed to the said Elizabeth, for life only, and upon her decease, to her issue, in the same manner as they would inherit the same if she died intestate.

"Second. I devise and bequeath to my son, Frederick W. Kalbfleisch, the bonds of the sewing machine company with which he is connected, now held by me, amounting to about the sum of \$23,000. I further order and direct that my executors, hereinafter named, shall deduct the amount of my endorsements and liabilities for my said son Frederick, amounting, as I believe, to between \$30,000 and \$40,000, from the sum of \$100,000, and also the amount of said sewing machine

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bonds; and I devise and bequeath to the said Frederick, the balance of the said sum of \$100,000, after such deduction, to be held and enjoyed by him during his natural life, and upon his decease, the said balance so bequeathed to him for life, shall descend to and be distributed to his issue, in the same manner as if the same had belonged to him absolutely, and he had died intestate.

"Third. I devise and bequeath to my daughter, Helen M. Thursby, the house and lot where she now resides, situate on South Fourth street, in the city of Brooklyn. I also devise and bequeath to the said Helen, the sum of \$92,000, being the sum of \$100,000, less the sum of \$8,000 for the said house and lot, the devise and bequest being for life only; and the said house and lot and the said balance of \$92,000 is to descend to and belong to her issue, at her decease, in the same manner and portions as if the same belonged to her absolutely, and she had died intestate.

"Fourth. I devise and bequeath to my son, Edward L. G. Kalbfleisch, the sum of \$75,000 for life, to have the use and benefit thereof; and at his decease, the said \$75,000 is to descend to his issue in the same manner as if the same had belonged to him absolutely, and he had died intestate.

"Fifth. I devise and bequeath to my three sons, Charles H., Albert M. and Franklin H. K., the sum of \$283,000, or thereabouts, being the amount now owing, or to become due on a contract for the purchase of real estate and business from me, and the same to be paid by a surrender or release of any securities or obligations now held by me for the payment of such sum, and a full release thereof. I further devise and bequeath to my said three last sons, Charles H., Albert M. and Franklin H. K. Kalbfleisch, the store and premises now occupied in part by them, situate on Fulton street, in the city of New York, at the corner of Cliff street, and the store and premises on Cliff street, subject, however, to the payment of \$113,000 to the other eight of my children, which last named sum is made a lien thereon, and is to be secured by a bond and mortgage executed by the said three sons, Charles H., Albert M.

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and Franklin H. K., on said premises so devised, to the other eight children.

"Sixth. I hereby devise and bequeath to my son, Franklin H. K. Kalbfleisch, the house and lot where he now resides, situate on Portland avenue, city of Brooklyn, subject, however, to the payment or security of payment of the sum of \$15,000 thereof to my said executors.

"Seventh. I hereby devise and bequeath to my daughter, Josephine M. L. Fleet, the house and grounds where I now reside, situate on Bushwick boulevard, near the corner of Grand street and said boulevard. I also devise and bequeath to my said daughter Josephine, the horses, carriages, furniture, bedding, and all other personal property now upon said premises, as enjoyed by me as a residence, to the same extent as now used and enjoyed by me.

"Eighth. I further devise and bequeath to my daughter, Isabella G. Weaver, the sum of \$75,000 for life, to be used and enjoyed by her, and said sum of \$75,000 is to descend to her issue, at the time of her decease, in the same manner and portion as if the same had belonged to her absolutely, and she had died intestate; but in the event of her dying without leaving any issue surviving her, then such sum of \$75,000 is to revert to and belong to my estate, and to be distributed among my heirs.

"Ninth. It is my intention that the amount of said mortgage of \$113,000, and the sum to be paid by my son Franklin for his house on Portland avenue, shall make a part of the amount specifically devised to my children, and shall not be considered as additional or in excess thereof.

"Tenth. I hereby devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my nine children, Elizabeth, Frederick, Helen, Edward, Charles, Isabella, Albert, Franklin and Josephine, to be divided equally between them to them and their heirs forever.

"Lastly. I hereby nominate and appoint my sons Charles H., Albert M. and Franklin H. K., the executors of this my last will and testament."

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The codicil contained this clause :

"First. I hereby authorize and empower my executors, Charles H., Albert M. and Franklin H. K. Kalbfleisch, named in my said will, to sell and convey all or any portion of my real estate not before specifically devised by said will, and I order and direct that the several sums bequeathed by said will for life to my several children, namely, \$74,000 to my daughter Elizabeth ; the amount of the bequest to my son Frederick W., to be fixed by deducting the amount of the bonds and my own liabilities from the sum of \$100,000, whatever that sum may be ; the sum of \$92,000 to my daughter Helen M. Thursby ; the sum of \$75,000, as devised by said will, to my son Edward L. G. Kalbfleisch, but which is herein reduced to \$50,000 ; and the sum of \$75,000, bequeathed to my daughter Isabella G. Weaver, being the sums specifically bequeathed to my said children by my said will, shall not be paid over by my said executors to the several parties to whom such bequests are made ; but it is my desire, and I hereby direct that my said executors shall invest the same in some safe manner, and pay over to the respective parties only the interest thereof during their respective lifetimes, and at the decease of each of said parties, to pay over to their respective issue the remainder of such bequests in accordance with the terms of said will."

The testator left him surviving the nine children named in the will.

The court found, in substance, that at the time of his death the testator was seized of the real estate specifically devised, and also of other real estate of the value of \$60,000 ; that the proceeds of his personal estate not specifically bequeathed, after the payment of debts and expenses, were insufficient to satisfy and discharge the pecuniary legacies, the deficiency being \$155,000, not taking into account certain uncollected claims belonging to the estate and certain disputed claims against it, unless the two charges of \$113,000 and \$15,000 were applied in payment thereof ; and if so applied there was a deficiency of \$27,000. The court found, as conclusions of

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law, that the legacies were, none of them, a charge upon the residuary real estate; that the charge of \$113,000 and the mortgage therefor upon the real estate, devised by the fifth clause of the will, was intended to be given to the six children of the testator other than the beneficiaries named in said clause, and that the same was a specific legacy to them absolutely and jointly without abatement and could not be applied to the payment of the pecuniary legacies, and that Josephine M. L. Fleet was entitled to one-sixth thereof; that the \$15,000 was intended to go to the executors to be applied in payment of the pecuniary legacies, and that in case of a deficiency of personalty applicable to the payment of said legacies, they should abate *pro rata*. Judgment was entered accordingly. The executors, plaintiffs, and the defendants other than Mrs. Fleet, appealed from all of the judgment save that portion in reference to the \$15,000. The General Term reversed the portions of the judgment appealed from and adjudged that the \$113,000 was intended by the testator to become a portion of his personalty to be applied in satisfaction of the pecuniary legacies given by the first, second, third, fourth and eighth clauses of the will, and that Josephine M. L. Fleet had no right or interest therein; also that the residuary real estate, in case of a deficiency of the personalty, including the \$113,000 and \$15,000, to satisfy the pecuniary legacy, should be sold, or so much thereof, as might be necessary to make up the deficiency.

*Philip S. Crooke* for the appellant. The pecuniary legacies were not chargeable upon the residuary real estate. (*Holt v. Vernon*, Prec. in Ch., 430; *id.*, 397; 3 Ves., 545; *Reynolds v. Reynolds*, 16 N. Y., 257-259; *Tracy v. Tracy*, 15 Barb., Ch., 503; *Lupton v. Lupton*, 2 J. Ch., 623; 3 Atk., 626, note; *Brudenell v. Boughton*, 2 *id.*, 268; *Keeling v. Brown*, 5 Ves., 359; *Harris v. Fly*, 7 Paige Ch., 421; *Taylor v. Dodd*, 58 N. Y., 335; *Greville v. Brown*, 7 H. of L. Cas., 700, 701; *Corwine v. Corwine*, 24 N. J. Eq., 580.)



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*Edgar M. Cullen* for the respondents. The pecuniary legacies are chargeable on the residuary realty. (*Taylor v. Dodd*, 58 N. Y., 343; *R. C. Ch. v. Wachter*, 42 Barb., 43; *Schuters v. Johnson*, 38 id., 80; *Tracy v. Tracy*, 15 id., 505; *Reynolds v. Reynolds*, 16 N. Y., 261; *Greville v. Brown*, 7 H. of L. Cas., 700; *Hawkins on Construction of Wills*, 294, 295; *Corwine v. Corwine*, 24 N. J. Eq., 580; *Van Winkle v. Van Houten*, 3 id., 172.) The whole charge of \$113,000 should go to the satisfaction of the five pecuniary legacies to be held in trust as provided by the codicil. (2 Jar. on Wills, 525; 1 id., 404.)

FOLGER, J. If the will, at the end of the fifth clause of it, had ceased to speak of the mortgage of \$113,000, it might, with some reason, be urged that the appellant, Mrs. Fleet, took a share thereof. It is plain that the numeral "eight," applied to the other children of the testator in that clause, is used mistakenly. It has no apparent meaning applicable to the facts of the case. As it cannot be applied, it must be entirely left out in the reading. Then the phrase, "other children," becomes controlling, and indicates all of the children of the testator, other than the three who are distinctly designated, as those to become the mortgagors to the others. For there is nothing in the fifth clause, nor in any preceding part of the will, to indicate with sufficient certainty what numeral ought to take the place of the word "eight." It is a rule in the construction of wills, that where a gift to children speaks of them as a specified number, which is less than the number in existence at the date of the will, the specified number will be rejected, on the presumption of a mistake; and all the children so in existence be held entitled, unless it can be inferred who were the particular children intended. (*Garvey v. Hibbert*, 19 Ves, 124; *Spencer v. Ward*, Law Rep., 9 Eq., 507.)

The principle upon which the earlier cases went, was to avoid intestacy by reason of uncertainty. If there is a gift to a number of children, when, in fact, there are more than that number, either the general intent to benefit all the class must

be acted on, and the statement of the number be treated as a mistake, or the gift must be held void for uncertainty; as it is not possible to say which out of the whole number are meant (*Wrightson v. Calvert, infra*); though sometimes this argument is thought not to be sound, and the authority of the precedents is yielded to rather than the strength of the reasoning. (Law Rep., 9 Eq., 509, *supra*; *Stebbing v. Walkey*, 2 Bro. C. C., 86.) It is otherwise, if the particular ones be pointed out by some additional description (*Wrightson v. Calvert*, 1 Johns. and Hem., 250); or where some of a class have already been provided for, and the specified number corresponds with the number of those unprovided for, and there is a division into the same number of shares. (*Shepard v. Wight*, 5 Jones Eq. [N. C.], 22.)

A like principle would have to be applied to this case, in which the number spoken of is greater than all "the other children" in existence. There is here an intent to benefit a class, which intent must be respected. But the exact number of that class is uncertain. Hence, there is the same necessity of a choice between defeating that intent, or holding that the use of the inapplicable number was a mistake. The law takes the latter horn of the dilemma, and gives the bequest to all of that class, be it larger or smaller in numbers.

Thus it is, that if the will stopped speaking of the mortgage at the fifth clause of the testament, it would be construed as a gift of the mortgage to the other children of the testator; that is, to all of his children other than the three who are directed to make the mortgage. Then Mrs. Fleet would take a share.

But we are not confined to the fifth clause, nor permitted to stop there. In the ninth clause the testator has made an emphatic utterance of his will as to the way in which the mortgage should go. The declaration in that clause must govern, because it is the later expression of his will, and because it is expressly stated as embodying his intention as to the mortgage. When we reach the meaning of that clause, it becomes apparent that Mrs. Fleet takes no share of the

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mortgage. In the first place, both the mortgage and the \$15,000 to be paid by the son Frederick are alike affected, and both are to be "a part of the amount specifically devised to his children." But Mrs. Fleet confessedly has no claim to any part of the \$15,000. And to hold that she has to the mortgage, we must interpolate words, so as to make the clause say, that the mortgage is to apply on the amount given to some of the six children, and the \$15,000 on that given to fewer of those children. This would be unwarrantably to split up, and add words to, a general restrictive clause which, taken as it reads, is intelligible and distinctly expresses the intention, that the mortgage and the sum of money shall be a part of gifts to the same beneficiaries. Again, the testator directs that the mortgage and sum shall be a part of the "*amount specifically devised.*" Now no amount, in an ordinary use of the word, that is, no sum of money, no security for a sum, no evidence of debt for a sum, is specifically given to Mrs. Fleet. She has a devise of specific real estate and a bequest of specific chattels. A share in a mortgage or a sum of money cannot become a part of a piece of real estate or of certain chattels. These are what are given to Mrs. Fleet, and, from their nature, she must and will take them as a whole or not at all. They are incapable of increase or excess, in kind, by adding to them a pecuniary legacy or a gift of a security. Whatever else the donee of them receives from the donor, must be something besides, and in addition to, them, leaving them the same in bulk and value. How, then, can she receive a part of the mortgage without taking in addition to, or in excess of, the specific devise and bequest to her, and in plain breach of the direction of the testator, that the gift of the mortgage shall not be considered a gift in addition to, or in excess of, the amount particularly given. To observe this direction of the will, if Mrs. Fleet receives a part of the mortgage, the executors must, in some way, diminish her interest in the real estate or the chattels specifically given to her. But that is impracticable, and obviously not within the intention of the testator. That the word "*devised*" is used, in speaking of the gift to his children,

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does not point to Mrs. Fleet, though she is technically a devisee. That word is used indiscriminately throughout the will with the word "*bequeath*," and is of no technical significance in this clause. A suggestion was made that the meaning of the ninth clause is: that so much of the mortgage as would belong to those of the six children who are the donees of pecuniary legacies, being five of them, and the whole of the \$15,000 from Franklin, are to be a part of those legacies, and that the other sixth of the mortgage is to go to Mrs. Fleet, without becoming a part of any prior devise or bequest. There is no such division of the amount of the mortgage made by the language of the clause. It is the amount of the mortgage, that is, the whole amount of it, which is to be a part of the amount of the bequests, that is, the whole amount of them.

We, therefore, conclude that Mrs. Fleet does not take, under the will, any immediate interest in the mortgage.

We are further of the opinion, that the testator meant to charge the payment of the pecuniary legacies given by his will upon his real estate not therein specifically devised.

In *Taylor v. Dodd* (58 N. Y., 335), we said, that though, as a general rule, the personal estate is to furnish the fund for the payment of legacies, yet it may be entirely exonerated, or the real estate may be made to aid the personal, if there be express direction to that effect in the will, or if such be the intent of the testator to be gathered from its provisions. It is not necessary to state any different or further general rule in this case. Nor is it necessary that we go into a consideration of the effect upon this question of the residuary clause in this will.

Here, as in *Taylor v. Dodd*, there is no express direction to charge the legacies. Our conclusion is put upon the intention of the testator as manifested in the will, considered in view of the circumstances in which it was made. The testator has given to his executors a power of sale of those parts of his real estate not specifically devised. Now, there was no real estate for this power to operate upon save the residuary. That, by the will, was given to all his children. So that a

necessary effect of giving a power of sale by the codicil, is more or less to disturb that gift of the will. It must have been in the mind of the testator then, when he made the codicil, that such would be a necessary effect. Such must have been his purpose. To what end? Not to the end of paying debts, for no mention of debts is made in the will. The personal estate was ample therefor. Debts of themselves, by the rights of creditors, will seek the real estate when the personal is exhausted. Not for the convenience of the devisees of the residuum, as such devisees, to convert it into personalty for their safety, ease or benefit. They were all adults, all capable of conveying. They took by equal shares. Either of them could, at any time, enforce a partition and sell or hold his share, as seemed best. And this meets and answers the plausible suggestion of the learned counsel for the appellant, that the testator foresaw the ruinous effects upon his unoccupied real estate of municipal taxes and assessments, and framed a door of escape that his executors might, at any time, throw open. The devisees, as the will stood, needed not this outlet nor the aid of the executors.

The power to sell is found in the codicil, and in the same clause of it with a testamentary provision, also first found in the codicil, for an investment of the principal sums of all the pecuniary legacies given by the will, for a payment of the income to the life-tenants of the legacies, and on their decease, respectively, of the remainder to their respective issue. By the will, the executors would have paid the legacies into the hands of the legatees for life. The codicil indicates an after-thought in the testator to secure the principal sum for the remaindermen, and, as cognate with that after-thought, a purpose to make sure the means of obtaining the whole of the principal sum by a sale of the residuary estate if there should be a deficiency. For there is no other object for which there was likely to be a need of a sale. And it is a familiar principle that real estate, sold in pursuance of a power of sale in a will, is deemed to be converted into personal property by the direction of the testator. (*Horton v. McCoy*, 47 N. Y., 21.)

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Opinion of the Court, per FOLGER, J.

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If this consideration be weak or be strong, it is aided by another. It is plain that the testator meant to dispose of his whole estate, and so that each of his children should share in it, and with an approximation to equality, all things considered. He looked upon them all as having claims upon his testamentary consideration. His gifts to them were from a sense of paternal duty and obligation. They were not gratuities flowing entirely from good-will. It is to be deemed of them, then, that he was solicitous that each one of his donees should be as reasonably sure of getting his or her share of the estate as any other. In such case, an intent to charge legacies upon land is more readily attributed to a testator. The intent is plain to provide for each member of the family, and to an extent for each approaching equality with the rest. This intent would fail, in this case, if the legacies were not charged upon the real estate. The law, then, infers, from provisions in the will well fitted to avoid such a result, an intent so to do. (*Van Winkle v. Van Houten*, 2 Green. [N. J.], 172, and cases there cited.) When, then, we find in this codicil this power of sale, with no other purpose hinted at, and with no other object appearing for the exercise of it, than to make sure of a fund for these pecuniary legacies, we are led, as we were by like considerations in *Taylor v. Dodd*, to conclude that the testator meant that the residuary real estate should, or might be, converted in aid of the personalty. We said in that case, which is applicable here: As, in the contemplation of the will and codicil, there was substantially no need of money, save for the payment of the legacies, so the power to sell to meet that need, must be to get money for that payment.

The judgment of the General Term should be affirmed.

All concur, except EARL, J., who was for reversal on first ground, and ANDREWS, J., who did not vote.

Judgment affirmed.

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Statement of case.

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JOHN VICTORY, Administrator, etc., Respondent, v. HENRY J. BAKER et al., Appellants.

So long as the owner of property violates no duty which he owes to others or to the State, he cannot be called in question for the manner in which he uses or manages it; and if, in the lawful exercise of his right to so use it, another is injured, he is not liable.

Plaintiff's intestate, P., a lad eighteen years old, lost his life by falling into a vat of boiling liquid in defendants' saltpeter factory where he had gone by direction of his employer to pay a bill due one of the defendants. In the factory were a large number of vats and tanks. The vat into which the deceased fell was at one side and under a passageway nine feet wide at the angle of its intersection with another leading to defendants' office. There was an opening to the vat, in the floor, closed by a cover, which was removed at the time of the accident. A sky-light was directly over the passageway at this point, making it very light in the daytime. The deceased did not enter the factory at the usual entrance, but crossed an adjoining lot and canal, climbed a fence and entered by a back door, and, in passing along the passage to the office, fell into the vat. Defendants' workmen were in the habit of entering the factory in the same way P. did, and occasionally others did so also. On each of the doors in front was a sign "no admittance" save one where the sign was "no admittance except on business," at which a person was usually in attendance to admit persons to the factory. In an action to recover damages, *held*, that defendants were not liable; that P., if not a trespasser, was, at most, in the factory by defendants' sufferance, and took the risks attendant upon being there in the condition in which the factory was; that no duty rested upon defendants to guard the vat for the protection of the deceased.

(Argued November 17, 1876; decided November 28, 1876.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for alleged negligence causing the death of Peter Victory, plaintiff's intestate. The facts appear sufficiently in the opinion.

## Statement of case.

*Jno. E. Parsons* and *Sidney V. Lowell* for the appellants. Whatever negligence or carelessness there was on the part of the deceased (*Reynolds v. N. Y. C. R. R. Co.*, 58 N. Y., 248; *Nicholson v. Erie R. Co.*, 41 id., 525; *Dougan v. Champ. Tr. Co.*, 56 id. 1; *Brush v. Brainard*, 1 Cow., 78; *Roulston v. Clark*, 3 E. D. S., 366; *Murray v. McLean*, 57 Ill., 385; Whart. on Neg., § 552; *Zolbisch v. Tarbell*, 10 Al., 385; *Wilkinson v. Fairrie*, 7 L. T. [N. S.], 599; *Grippen v. N. Y. C. R. R. Co.*, 40 N. Y., 34; *Wilds v. H. R. R. R. Co.*, 24 id., 430; *Johnson v. H. R. R. R. Co.*, 20 id., 65; *Weber v. N. Y. C. and H. R. R. R. Co.*, 58 id., 451; *Pad-dock v. N. E. R. Co.*, 18 L. T. [N. S.], 60; *Bolsh v. Smith*, 7 H. & N., 736). It was error to submit the case to the jury. (*Barlec v. N. Y. and H. R. R. Co.*, 59 N. Y., 356; *Toomey v. R. Co.*, 3 C. B. [N. S.], 148; *Colton v. Wood*, 8 C. B., 568; *Avery v. Bowden*, 6 E. & B., 973, 974; *McMahon v. Lennard*, 6 H. of L. Cas., 970, 993.)

*S. D. Morris* for the respondent. Defendants were guilty of negligence. (S. & R. on Neg., 501, §§ 498, 508; Whart. on Neg., § 826, 349; *Chapman v. Rothwell*, 1 E. B. & E., 168; *Shoelbottom v. Egerton*, 18 L. T., 364, 889; *Inderman v. Dawes*, L. R., 2 C. & P., 311; 59 N. Y., 32.) There was no contributory negligence on the part of the deceased. (Stark. on Ev., 872 [8th Am. ed.]; *Ingram v. Watkins*, 1 D. & B. [N. C.], 442; *Mercer v. Wright*, 3 Wisc., 645; *Roth v. Wells*, 29 N. Y., 471; *State v. Jin*, 1 Den. [N. C.], 508; *State v. Pearce*, 1 J. L. [N. C.], 251; *State v. Williams*, 2 id., 257; *Walkins v. Earle*, 44 N. Y., 182; *People v. Evans*, 40 id., 5; *Brett v. Cutlin*, 47 Barb., 404; *The Santissima Trinidad*, 7 Wheat., 335.) The court properly refused to direct a verdict for defendants. (*Thurber v. H., B., M. and R. R. Co.*, 60 N. Y., 326; *Weber v. N. Y. C. R. R. Co.*, 58 id., 455; *Sheehy v. Burger*, 62 id., 558; *Belton v. Baxter*, 58 id., 411; *Sheehan v. Edgar*, id., 631; *Filer v. N. Y. C. R. R. Co.*, 59 id., 351; *Hackford v. N. Y. C. R. R. Co.*, 53 id., 654; *Spooner v. Bkln. City R. R. Co.*, 54 id., 230; *Gillespie*



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Opinion of the Court, per ANDREWS, J.

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v. *City of Newburgh*, id., 468; *Moody v. Osgood*, id., 493; *Colegrove v. N. Y. H. R. R. Co.*, 20 id., 492; *Heycroft v. L. S. and M. S. R. Co.*, 2 Hun, 489; N. Y. Weekly Dig., Mch. 27, 1876.)

ANDREWS, J. The ownership of real or personal property carries with it to the owner the right to enjoy, use and manage it in any way he pleases, subject only to restrictions imposed by law or by the duty which he owes to third persons. It cannot be an absolute right else the right of property would be free from all control by the municipal law, and it must be exercised in view of the legal rights of others in order to preserve the rights of all. But so long as the owner violates no duty which he is under to others or to the State, he cannot be called in question for the manner in which he chooses to use or appropriate his property; and if, in the lawful exercise of his right, and without negligence on his part, a third person sustains an injury from its use by the owner, the owner is not answerable.

The plaintiff's intestate lost his life by falling into a vat of boiling liquid in the factory of the defendants where he had gone, by direction of his employer, to pay a bill which the employer owed one of the defendants. For this casualty the defendants are not liable, unless having this vat in the condition and at the place where it was, was, under the circumstances and as to the deceased, a negligent act which caused his death. We are of opinion that the action, in point of the defendants' negligence, is not sustained. They had erected on their own premises a factory for the manufacture of saltpeter and other articles in which they had placed a large number of vats and tanks to be used in the business. The vat into which the deceased fell, was situated on one side of and under a passageway about nine feet wide at the angle formed by the intersection of this passageway with another at right angles to it, leading to the laboratory and office of the defendants. The vat was about five feet in diameter with an opening over it in the floor twenty inches square, which was closed by a cover fitting into the opening

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and resting on the timbers under the floor. There was a skylight directly over the passageway making it very light, and there was nothing to prevent persons passing there in the day time seeing the vat, although at times the vision was somewhat obscured by the steam arising from the vats and tanks in the room. There was ample room on one side of the opening for persons to pass, and the passageway and vat had been in use for more than eight years and no accident had happened before the one in question. The deceased was a lad eighteen years of age and went to the factory on the errand mentioned about nine o'clock in the morning. He did not enter at the usual entrance, but crossed a lot adjoining the factory on the south, to a canal which bounded the defendants' premises on the east, and he then passed on the string-piece of the canal around a fence which extended to the canal on the south line of the defendants' lot to the rear of their premises and entered the factory by the back door, and in going along the passage mentioned on his way to the office, slipped or fell into the vat. The day was bright. The vat was at the time wholly or partially uncovered, and the evidence is conflicting as to whether any steam was issuing from it. The workmen of the defendants were accustomed to go to and from the factory by climbing around the end of the fence on the canal at the point where the deceased came upon the premises, and occasionally other persons entered the same way, but the usual and proper entrance was at the front of the building, and on all the doors in front was a sign "no admittance," except that on one there was a sign "no admittance except on business." A person was usually in attendance at this door to admit persons coming to the factory.

Upon the facts proved we are of opinion that no liability was established against the defendants. The defendants were pursuing a lawful business on their own premises, and they had arranged their factory, and the vats, tanks and passageways to suit their own convenience. They had lighted the passageway where the vat was, into which the deceased fell, and had guarded the usual entrance to the factory by signs

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Opinion of the Court, per ANDREWS, J.

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and otherwise, so that they should have notice when persons entered the premises. The deceased was not in the factory by their invitation, express or implied. He was not there upon the business of the defendants, but upon the business of his employer. He entered by a way not intended to be used as an entrance to the factory, and although the workmen and occasionally other persons used it, it was in disregard of the manifest intention of the defendants, as indicated by the fences and other arrangements of the property

It is not necessary to say that the deceased was a trespasser, but at most he was there by the sufferance of the defendants, and he took the risks, attendant upon his being in the factory in the actual condition in which it was.

A man may make an excavation on his own land, and leave it unguarded without incurring any liability to persons passing over the land with his license or permission, who may be injured by falling into it. (*Houersell v. Smyth*, 7 C. B. [N. S.], 729; *Balch v. Smith*, 7 H. & N., 706.) If the owner places a spring gun on his premises, or does other like act imminently dangerous to human life, and designed to endanger it, he may be held responsible even to a trespasser, but the facts in this case do not bring it within the principle upon which the liability in the case supposed rests. So also where one allows a dangerous place in the nature of a trap, to exist on his premises, he will be responsible for an injury caused thereby to persons who, by his invitation, express or implied, go thereon. The case of a customer who goes to trade at a store, or of a guest at an inn, are examples where the relation between the parties imposes a duty to make his premises reasonably safe for those who by his invitation enter them. (*Chapman v. Rothwell*, 1 El., B. & El., 168; *Indermaur v. Dames*, 1 L. R., Com. Pl., 274; S. C., 2 id., 311.)

Under the circumstances in this case, no duty rested upon the defendants to guard the vat, or do any other act for the protection of the deceased. They were using their premises in the usual and customary way, and we are of opinion that

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Statement of case

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there was a failure to show any duty violated by the defendants, or any negligence which will sustain this action.

In this view it is not necessary to consider the question of contributory negligence.

The judgment should be reversed and new trial granted.

All concur.

Judgment reversed.

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IN THE MATTER OF THE APPLICATION OF THE PROSPECT PARK  
AND CONEY ISLAND RAILROAD COMPANY TO ACQUIRE TITLE  
TO LANDS, IN KINGS COUNTY, OF WILLIAM MOYNAHAN AND  
OTHERS

The fact that a railroad corporation has constructed and commenced operating its road in reliance upon a title subsequently found to be defective, is no objection to proceedings on its part to perfect its title to lands so occupied, under the provision of the general railroad act (§ 21, chap. 140, Laws of 1850) authorizing railroad corporations to perfect defective titles.

Under the provision of the act of 1873 (chap. 531, Laws of 1873), authorizing the G. and C. I. R. R. Co. to construct its road and lay its track upon Gravesend avenue, said company is excused from complying with the prerequisites to proceedings to acquire title to lands prescribed by the general railroad act; *i. e.*, the making and filing of a map or profile of its route; the giving of notice of such proceedings to actual occupants, and notice to the highway commissioners; and also from making an application to and obtaining an order of the Supreme Court as required by the act of 1854. (Chap. 582, Laws of 1854.)

So far as said act is valid, and so far as its valid provisions are inconsistent with the general railroad acts, it is a special charter for said corporation; and so far exempts the corporation from the force of those laws. Where it is not in conflict, the corporation is bound by, and may avail itself of the privileges given by, said laws; among others, the privilege of perfecting a defective title.

Although a highway is devoted to one public use, the legislature may, by special enactment, devote it, concurrently, to another public use, so far as declaring a necessity for that other use is concerned.

Where power is given by statute to one railroad corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the statute.

## Statement of case.

The provision of the general railroad act (§ 13), making it a prerequisite to proceedings *in invitum* to acquire title to lands that the company shall be "unable to agree for the purchase," does not mean an impossibility to purchase at any price, however large, but that the owner must be either unwilling to sell at all, or only willing to sell at a price which, in the judgment of the agents of the corporation, is excessive.

An amendment of the petition of a railroad corporation, in proceedings to acquire title to lands, so as to ask for a less quantity of land, made upon the hearing at Special Term, does not make necessary a further attempt at agreement on a price, at least, where the owners are represented in court, and no suggestion is made in their behalf of a withdrawal of opposition, or for a suspension of proceedings with a view to such an attempt.

The said act of 1873 is not amenable to the constitutional objection (Const., art. 3, § 16) that it embraces more than one subject. The title to the act is expressive of the subject, which is to open certain lands for public use, and the different provisions are but the details of that subject. So, also, the act of 1874 (chap. 448, Laws of 1874), entitled "An act for the relief of Park Avenue Railroad Company, in the city of Brooklyn, and to authorize the extension of its tracks through certain streets and avenues in said city," expresses the subject sufficiently for the purposes of said constitutional provision. The subject, *i. e.*, the relief of the company, necessarily includes provisions removing restrictions upon its powers, and giving it greater powers.

The constitutional provision (art. 3, § 1) in reference to the formation of corporations does not render a special charter, or a special addition to a charter taken under a general law, unconstitutional.

Where proceedings are instituted by a railroad corporation to condemn various pieces of land belonging to different owners, all being described in one petition, and the case as to all is heard together, although separate orders are entered as to each owner, there is but one proceeding, and all the orders may be reviewed upon one appeal; so, also, where the orders are affirmed at General Term, and separate orders of affirmance entered, costs for but one case are proper.

(Argued November 14, 1876; decided November 21, 1876.)

**APPEAL** from orders of the General Term of the Supreme Court in the second judicial department affirming orders of Special Term, appointing commissioners of appraisal in proceedings under the general railroad act to acquire title to lands. (Reported below, 8 Hun, 30.)

Application was made against twenty-two owners of different parcels of land. One petition was presented, entitled as

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Statement of case.

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above, and one answer was put in for all the owners on trial of the issues. It was stipulated that the evidence taken in one case should be considered as taken in all. Separate orders were entered in case of each owner, and, upon a trial at the General Term, separate orders of affirmance were entered, but one notice of appeal on behalf of all the owners was served. The respondent moved that the appeal be dismissed and that appellants elect which order is appealed from.

In and by the petition the petitioner described and sought to acquire a strip of land sixty feet wide; upon the hearing its counsel asked permission to amend the descriptions of the several pieces of land described, so as to make it twenty-five feet wide instead of sixty. This was granted, and counsel for the owners duly excepted.

Under the provisions of the act (chapter 448, Laws of 1874, § 3) entitled "An act for the relief of the Park Avenue Railroad Company, and to authorize the extension of its tracks in the city of Brooklyn," which provision authorized that company to consolidate with any other company and form a new company, and, under the provision of the railroad act of 1869, authorizing consolidations, said company effected a consolidation with the Greenwood and Coney Island Railroad Company, the name of the new company being "The Prospect Park and Coney Island Railroad Company," the petitioner herein. Both of the original corporations were organized under the general railroad act. The route of the Park Avenue Railroad Company, as described in its articles, was upon certain streets in the city of Brooklyn. The articles of the Greenwood and Coney Island Railroad Company designate its route as along certain streets in the city of Brooklyn to Gravesend avenue, and then along said avenue, as laid down on the map of the town survey commissioners. Under the provision of the act (chapter 531, Laws of 1873) entitled "An act to open, lay out and improve Gravesend avenue, in the county of Kings, and to authorize the construction of a railroad thereon," which provision (§ 13) authorized the said The Greenwood and Coney Island Railroad Company to construct

## Statement of case.

and operate its road on said avenue, said company laid its tracks thereon, and the road was operated by its successor, the petitioner herein. An action was brought by an adjoining owner to restrain it from using and operating its road, wherein it was held that the fee of the land was not taken, but only an easement, for the purposes of a highway; that the owners held the fee subject only to such use; and that no valid authority was given by the statute of 1873 to petitioner to construct or operate its road thereon. An injunction was accordingly granted.\*

This application was therefore made to condemn the lands in said Gravesend avenue, so occupied by the track of the petitioner.

The petition stated that the petitioner was unable to acquire title to the lands, for the reason that it was unable to agree with the several owners. Its president testified upon the hearing that he called upon the owners of each of the pieces of land described in the petition and asked them to give the right of way, or to name a price they would take; that they declined to name a price, save one, who wanted \$2,500. He thereupon offered each of them five dollars, which they refused.

Further facts appear in the opinion.

*Benj. G. Hitchings* for the appellants. The petitioner having taken possession of the land, constructed and completed its roadway and operated it without right, and without taking or attempting to take any legal proceedings to ascertain and pay compensation, cannot now avoid the legal consequences of its own wrong by proceedings to take the land. (*Broodgood v. Mohawk R. R. Co.*, 18 Wend., 9; *Blodget v. U., etc., R. R. Co.*, 64 Barb., 581; *In re Townsend*, 39 N. Y., 171; 2 R. S. [6th ed.], 526, § 20; *In re B. and A. R. R. Co.*, 53 N. Y., 575; Laws of 1864, chap. 582, § 28; Const., art. 3, § 18.) The consolidation of the two previous companies was

\* See *Washington Cemetery v. Prospect Park and Coney Island R. R. Co.* (7 Hun, 655 affirmed by Court of Appeals, March, 1877).

## Opinion of the Court, per FOLGER, J.

not legal or valid. (Laws of 1869, chap. 917, §§ 3, 7; 2 R. S. [6th ed.], 557, §§ 123, 127.) The map and profile filed were insufficient. (*N. Y. and B. R. R. Co.*, 62 Barb., 85; Laws of 1869, chap. 237, § 22.) There was no notice to the commissioners of highways or application to the Supreme Court, or order thereof, as is required when the route of a railroad crosses a highway. (Laws of 1864, chap. 582, § 28.) No *bona fide* attempt had been made to acquire title by purchase before the proceedings were instituted. (2 R. S. [6th ed.], 523; *Dyckman v. Mayor, etc.*, 5 N. Y., 434, 439; 5 Wait's Pr., 343.) The allowance of twenty-two separate orders in one proceeding was erroneous. (*T. and R. R. R. Co. v. Cleveland*, 6 How. Pr., 238; 5 Wait's Pr., 353.)

*John H. Bergen* for the respondent. The burden of proof was on the landowners to disprove the allegations of the petition. (Laws of 1850, chap. 140, § 15; amended by Laws of 1854, chap. 282, § 2.) The act of 1873 (chapter 531) is local, but not private. (*People ex rel. v. Dudley*, 58 N. Y., 332, 333; *People v. Quigg*, 59 id., 88; *Harris v. People*, id., 601; *People ex rel. v. Supervisors of Chautauqua*, 43 id., 10.) If the appellant desires to review each order, he must take separate appeals. (*In re Commissioners of Central Park*, 50 N. Y., 493.)

FOLGER, J. It may be conceded, for the purposes of this case, that the corporation has, as yet, acquired no right in the lands of the appellants. This proceeding, taken by it, practically so concedes, for this occasion. The question then presented is, have the appellants shown such objections to the proceeding as will defeat it?

That the petitioner has already constructed and is operating its road, is no legal reason why it cannot take proceedings to acquire a right to use the lands upon which its track is laid. It is plain that it was deemed certain by it, that by the act of 1873 (Laws of 1873, chap. 531, p. 832), it had power to use the lands for its purposes. Such must have been the legisla-



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tive conviction as well as that of the corporation. Relying upon the legislative authorization and supposing it had good title by the empowering statute, it fully built its road and used it. So far as this legislative act is valid, and so far as in its valid provisions it is inconsistent with the general railroad laws, it is as a special charter for this corporation, and, by so much, exempts this corporation from the force of those laws. Wherein this act does not conflict with those laws the corporation is bound by them, and may avail itself of the privileges given by them. Hence it may avail itself of the right given by them, to take proceedings to acquire title, where what was thought to be a good title has proved defective.

It is manifest that this permission of those laws would be of small benefit, if it was confined only to those companies which had not yet built their track nor located their route. Indeed, it must be principally beneficial to those which have, in reliance upon a title, afterwards seen to be unsound, gone on to occupy and use the lands; and such must have been the chief purpose of this provision.

In most instances, doubtless, such companies will, on or before the first taking of lands, have complied with the prerequisite of those laws, that they shall make and file beforehand a map and profile of their routes, and give notice thereof to actual occupants. But in this case, by the provisions of the act of 1873, inconsistent with this requirement of the general railroad laws, this company is excused from showing that it has done this. The very power given by that act to this company to lay its track upon Gravesend avenue, is in place of a map and profile, and in place of notice, inasmuch as that avenue is as well defined a route as any survey or map can present. By the act itself all the purposes are reached which are sought by the requirement of the general laws. The termini of the route, so far as this avenue is concerned, are, by the act, established; the course and distance of it, and the grade at which it shall be built. The act being thus special as to the route, saves the purpose and the need of notice to actual occupants; even if it be allowed that adjoining owners

upon the sides of the avenue are actual occupants ; as to which no opinion is intimated. The act being authority from the people, through one set of their representatives, saves the need of notice to the highway commissioners, another inferior set of their representatives, and the need of application to the Supreme Court, another representative (Laws of 1864, chap. 582, p. 1335, § 1), and meets the principle declared in *In re Boston and Albany Railroad Company* (53 N. Y., 574). Although the avenue was devoted to one public use, the sovereign power may, by special enactment, devote it concurrently to another, so far as declaring a necessity for that other public use is concerned.

The act of 1874 (Laws of 1874, chap. 448, pp. 591, 592, § 3) gave power to one of the corporations, which now together form the corporation which is the petitioner in this case, to consolidate with any other like corporation. The point of the appellants, that no power to consolidate is given to the other of those corporations, is without effect. Power is given by statute to one corporation to form a consolidation with *any other*. It cannot form a consolidation unless it finds another with which to unite and which is capable of union with it ; hence, whatever other company it selects for a union, and finds willing to join it, that other company, though not named in the statute, gets power from the statute to unite with that company which the statute names.

The negotiation which took place between the president and engineer of the petitioner and the respective owners, was enough to show that it was unable to acquire the title by agreement with them. That provision of the general railroad law does not mean that it must be impossible to buy the right of way at any price, however large ; it means that the owner must be either unwilling to sell at all, or willing to sell only at a price so large, as in the good judgment of the agents of the corporation is excessive. That appears here. Though the price offered to the owners was nominal, they refused to name any price, or that asked by them was so much beyond the view of value held by the president, that there seemed no

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Opinion of the Court, per FOLGER, J.

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likelihood of agreement, and it was fitting that commissioners should be appointed to arrive at a sum to be given in each case.

The amendment of the petition at the commencement of the hearing at Special Term, so as to ask for less width of land, did not make necessary a further attempt at agreement on a price. The parties were all represented in court; though no testimony had been taken, no suggestion was made by the owners, of a withdrawal of opposition, or for a suspension of proceedings with a view to such an attempt. The appellants still opposed; not alone on the ground of no such attempt, but on the radical grounds now urged; nor does it appear that the position now taken was the ground of, or entered into, the objection to the amendment.

We do not think that the acts relied upon by the company are unconstitutional on the grounds now urged. The title of the act of 1874 does express the subject of the act sufficiently for all the purposes of the Constitution. The act does not treat of more than one subject; all that is in it might have well been in an act incorporating this company. It would have been the details of the one general subject. An act for the relief of a railroad company, must be one to remove some restriction upon its powers, or to give it greater powers. An act entitled, for the relief of such a corporation expresses such subject. So, the title to the act of 1873 is expressive of the subject of the act. There is one general subject—to open certain lands for public use; the different sections are but of the details of that general subject, and not of more than one general subject; and the thirteenth section, referring to the articles of association, brings into the act the particulars of the route in those articles contained. The general provision of article 8, section 1 of the Constitution has never been held to render unconstitutional a special charter, or special additions to a charter taken under general laws; and it is not new that railroad corporations have been authorized by special statutes to consolidate.

The orders appealed from should be affirmed; but in adjust-

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ing the costs there must be an allowance for one case only; for though many orders have been entered there is but one proceeding.

For the same reason, we think that the motion to dismiss the appeal, or to compel an election, should be denied; there is but one proceeding; the orders are all made in it; they are cognate.

All concur.

Orders affirmed and motion denied.

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JAMES KENNEDY, Appellant, v. JOHN RYALL, Administrator,  
etc., Respondent.

The rule of mercantile law making the master of a vessel liable for the negligent acts of those under his authority, to the same extent as if he was the owner, applies without regard to the question whether the officers or men were employed by himself or the owners.

The authority given to the health officer of the port of New York by the statute (chap. 275, Laws of 1850) to take charge of a vessel subject to quarantine, and to control and direct, so far as necessary for quarantine purposes, the master and other employes thereon, is but temporary and specific; and the officers and men employed upon the vessel are not in any sense his agents or servants after his duties on board the vessel are performed and he has left it; it devolves upon the master to see that the vessel is restored to a proper condition for the comfort and safety of passengers.

Defendant was in command of a steamship at quarantine, which was directed to be fumigated by the deputy health officer of the port of New York; by his order, the chief steward cleared the passengers from the steerage, and utensils containing some poisonous substance were placed therein for the purpose of fumigation. The health officer gave instructions as to the length of time the steerage should remain closed, and as to the removal of the vessels; one of these, an ordinary drinking cup, was not removed with the others, and plaintiff's intestate, a child four years and nine months old, who, with his mother, had been ordered by the steward to return to the steerage cabin, drank some of the poison in the cup, and died from the effects thereof. In an action to recover damages, *held*, that it was within the line of the defendant's duty to see that the poison was removed; and for his negligence, or the negli-

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gence of his subordinates, in omitting to discharge this duty, he was liable.

Also *held*, that, as the mother of the deceased had been directed to return to the cabin, she had the right to infer that every thing was safe, and that no extraordinary diligence on her part was required for the protection of her child.

At the time of the accident, plaintiff, who was the father of the child, lived, and for seven months prior thereto had lived, in New York; he came from England, and his wife and child were coming to join and live with him. *Held*, that the evidence was sufficient to show *prima facie* that he was domiciled in New York; and so that his child was an inhabitant thereof; and that the surrogate of that county properly issued letters of administration to him.

Plaintiff testified that he came to New York for the purpose of making a home and a living there. This was stricken out on motion of defendant's counsel. *Held*, error; that the evidence was proper and material on the question of residence.

(Argued November 17, 1876; decided November 28, 1876.)

APPEAL from order of the General Term of the Superior Court of the city of New York reversing a judgment in favor of defendant, entered upon an order dismissing plaintiff's complaint on trial, and granting a new trial.

This action was brought to recover damages for the alleged negligence of defendant, causing the death of plaintiff's intestate.

The plaintiff left London, England, in July, 1870, and since the twenty-seventh of that month has resided in the city of New York. On the 2d of March, 1871, his wife and his two children, one being the deceased, an infant four years and nine months old, sailed in the steamship "City of Brussels," commanded by the defendant, to join him. Upon the twelfth of March the ship arrived in the port of New York, and having small-pox on board, went to the quarantine anchorage, opposite the quarantine station on Staten Island. The deputy health officer came on board, and, under his directions, the chief steward cleared the steerage of all the passengers, ordering them on deck, and the health officer then fumigated the ship. The material used for this purpose was a deadly poison, and was distributed around the cabins in basins and in the passengers' pannikins, which are their drinking cups. The

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health officers, closing the cabins and leaving instructions as to the length of time they should be kept closed, and as to the removal of the vessels, left the ship and went on shore. In about one hour after, the head steward of the ship ordered the plaintiff's wife and children down into the cabin, where, after remaining about half an hour, the deceased came running and crying to her with a pannikin in his hands, with his tongue protruding from his mouth, thick and white, having drank the contents of the pannikin, which turned out to be some poison that had been used to fumigate the ship. The child died in about three hours after.

Letters of administration were granted on the infant's estate, by the surrogate of New York county, to the plaintiff.

The defendant was not in any way interested in the steamship, as owner or otherwise than as the captain.

Upon the trial, plaintiff testified that he came to New York for the purpose of making it his home and living here. This was stricken out on motion of defendant's counsel.

At the close of the evidence, a motion was made to dismiss the complaint, which was granted.

*James W. Gerard* for the appellant. No such residence or habitation was shown on the part of the father as would give the surrogate of the county of New York jurisdiction. (3 R. S. [Banks' 6th ed.], 76, § [23] 24; *id.*, 167, § 4; *People v. Corlies*, 1 Sandf., 228; *People v. Barnes*, 12 Wend., 492; *Corwin v. Merritt*, 3 Barb., 341; *Paff v. Kinney*, 1 Bradf., 1; *Sheldon v. Wright*, 5 N. Y., 497; *Guier v. O'Daniel*, 1 Bin. [Penn.], 349; *Munro v. Munro*, 7 C. & F., 842; *Dupuy v. Wurtz*, 53 N. Y., 556; Phillmore's Law of Domicile, §§ 173-176, 186, 187.) It was proper to raise this question on the trial of this action. (*Dutchess of Kingston's Case*, 2 S. L. Cas., 689; *Bolton v. Jacks*, 6 Robt., 166; *Kentz v. McNeil*, 1 Den., 436; 3 Redf. on Wills, 58, § 5.) Defendant, as captain of the vessel, was not liable. (Dunlap's Paley's Agency, chap. 6, § 2, p. 402; *City of Buffalo v. Holloway*, 7 N. Y., 493; Smith's Master and Servant, 75 Law Lib., 151,

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152; *Kelly v. Mayor, etc.*, 11 N. Y., 432; *Blake v. Ferris*, 5 id., 48; *Maximilian v. Mayor, etc.*, 62 id., 160, 163; *Nicholson v. Mounsey*, 15 East, 382; *Blakie v. Stenbridge*, 6 C. B., 893; Laws of 1850; chap. 275.) The deceased and its mother were guilty of contributory negligence. (Redf. on Car., § 528; *Wilcox v. R., W. and O. Railroad Co.*, 39 N. Y., 358; *Mangan v. Brooklyn City Railroad Co.*, 36 Barb., 237; *Burke v. Broadway, etc., Railroad Co.*, 44 id., 529; *Flynn v. Hatton*, 4 Daly, 552; Wharton on Neg., § 311.)

*Rufus B. Cowing* for the respondent. The master of a ship is personally liable to third persons for damages happening by reason of the negligence of himself or his mariners. (Serg. & R. on Neg., 131, § 113; *Denison v. Seymour*, 9 Wend., 1; *Schieffelin v. Harvey*, 6 Johns. 169; *Foot v. Wiswall*, 14 id., 303; *Watkinson v. Langton*, 8 id., 213; Abb. on Shipping, 231, notes on pp. 231, 232; id., 173, note 1; Story on Agency [8th ed.], §§ 314-319 and notes.) The surrogate had jurisdiction. (Story on Conflict of Laws, § 46; *Sprague v. Litherbury*, 4 McL., 442; 3 Ohio, 101; 4 Greenl., 47.) Plaintiff was entitled to have the issues, as to negligence, submitted to the jury. (*Wolfkiel v. Seventh Ave. Railroad Co.*, 38 N. Y., 49; No. 11 N. Y. W. Dig., 225; *Berhart v. R. and S. Railroad Co.*, 32 Barb., 165; *Williams v. O'Keefe*, 24 How., 116.) The deceased and his mother were free from negligence. (*Cook v. N. Y. C. Railroad Co.*, 42 N. Y., 476; 38 id., 49.)

MILLER J. The question how far a master of a vessel is answerable for damages arising by reason of the negligence of those employed under him, lies at the foundation of this action.

The testimony upon the trial establishes that the steamship of which the defendant was in command was fumigated under the directions of the deputy health officer of the port of New York, who, by statute, has full authority for that purpose. By his order it devolved upon the chief steward to clear the

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passengers from the steerage and keep them away from the effect of the dangerous substance employed. The utensils, which consisted of pans and pannikins in which to pour the poisonous materials, were also furnished by the steward. After closing the steerages and leaving instructions as to the length of time they should be kept closed and as to the removal of the vessels containing the poison, the steamship was left by the deputy health officer and his men, the chief steward having been cautioned in regard to the poison. In about one hour afterwards the steward ordered the plaintiff's wife and children down in the cabin, and in about half an hour after this the poison was taken, by the deceased, from a pannikin, which had not been removed with the other utensils, which was seen by the child's mother on a seat by the dining table in the steerage, where the child was playing, and from the effects of the poison, the child, soon after it was taken, died. Although the health officer has power, under the laws of the State, to take charge of the vessel for the purposes indicated in the statute, and the master and other employes are subject to his control and direction in reference to the subject, so far as the object to be accomplished is concerned, that officer occupies no such position as confers upon him superior authority, so as to render the officers and employes on the vessel his servants and agents after he had left the same. The duties of the health officer are but temporary and specific, being confined entirely to the cleansing of the vessel. In carrying out this purpose he may direct the master and other officers as to details and secure their aid; but it surely is not required of him to remain and see that the utensils employed are cared for and the cabin placed in proper condition for the accommodation, comfort and safety of the passengers. When the deputy health officer and his men had furnished the proper materials, distributed the pans and pannikins around the steerage and given the proper instructions their business was at an end, and it devolved upon the captain or such officer as might be assigned by him for that purpose, to attend to the removal of the vessels used and to the resto-



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ration of the ship to a suitable condition. After the fumigation was completed, it was his right, and clearly within the line of his duty, to see that the materials employed were not left in an exposed position, where they might be productive of injury or serious and fatal results to any of the passengers. The chief steward having furnished the utensils which contained the poison used in the fumigation, given directions to the passengers to leave the steerage, received instructions in regard to the same and directed the mother and child when to return, it would seem to follow, unless other orders were given, that it was also a part of his business to free the cabin from all dangerous materials. In this respect he was in no sense the agent of the deputy health officer, and was not delegated to perform any part of his duty. So far as he attended to the removal of the poison and the reinstatement of the steerage, he was apparently acting within the general scope of his duties. Although not directly proved that this duty especially belonged to him, it may be assumed from the fact that he did perform it in the absence of any other directions from the master, that it was his work, and that it was performed with the approval of his superior officer. He was, then, to all intents and purposes, the servant of the master, acting for him and on his behalf. That officer was in command of the vessel, and it was under his control and subject to his general management and direction—at least until the completion of the voyage, and it was safely in port. By a rule peculiar to the *mercantile* law, the master is liable for the negligent acts of an employe, while engaged under his authority, to the same extent as if he were the ultimate principal, who is ordinarily bound to respond in damages for such negligence. (Shear. & Redfield on Neg., § 113.)

In *Denison v. Seymour* (9 Wend., 1) an action was brought for an injury occasioned by the negligence of an employe, acting as the pilot of a vessel, and it was held that the master was liable. And this rule applies without any distinction whether the officers and men were appointed by the owners or himself. (Story on Agency, § 316; see also, *Schieffelin v.*

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*Harvey*, 6 J. R., 169; *Foot v. Wiswall*, 14 id., 306; *Watkinson v. Laughton*, 8 id., 213.) From the authorities cited it is manifest that the ground upon which the rule of *respondeat superior* is based, viz., the right which the employer has to select his servants and to discharge them, has no application to a case which involves the relations between a master of a vessel and the employes upon the same. It follows that the defendant was liable if the chief steward was negligent in not removing the pannikin which was the cause of the death of the intestate. It appears that he left the pannikin, which was an ordinary drinking cup, which might well attract the attention of a child of tender years, and which might very naturally be taken up to drink from; and being well acquainted with the nature of the poison it was the plain duty of the steward to guard with extreme care against the danger of such an accident. The evidence establishes that he knew that pannikins had been used in the fumigation, and it is but reasonable to require that he should have taken pains to find and remove them. Having failed to exercise the vigilance and care which was essential for that purpose, it was a fair question for the jury to determine whether his omission was negligence.

There is no valid ground for claiming that the child or its mother was chargeable with negligence which contributed to produce the injury. The mother was present in the cabin with the child within her sight and hearing, and appears to have given him all the care and attention which was required for his protection and well-being. She had no knowledge of the existence of the cup containing the poison, and no reason to apprehend that any danger was at hand in consequence of the fumigation. As she had been directed to go into the cabin she had a right to infer that every thing was safe there, and that no extraordinary degree of vigilance was required for the protection of her child. Under the circumstances, there is no valid ground for claiming, that contributory negligence was established.

It is insisted by the defendant's counsel, that the plaintiff

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cannot maintain this action in a representative capacity, for the reason that the surrogate of New York had no power to issue letters of administration. Assuming that this point can be raised collaterally in this action, the soundness of the objection urged depends upon the question whether the plaintiff's intestate was an inhabitant of the city and county of New York. At the time of the death of the child and for seven months prior thereto, his father, the plaintiff, was living there. He had previously resided in England, and his wife and the child came to join him and to live with him in New York. He testified that he came there for the purpose of making a home and a living. This evidence was erroneously stricken out, and as it was material upon the question of residence, and as the action can be maintained as already shown, this error would entitle the plaintiff to a new trial. But without regard to this testimony, and independent of it, the evidence upon the trial tends to show, that his domicile was in New York. He had left or emigrated from his own country, located, and was at work in New York, thus showing an intention to establish a residence there, and so far as the evidence goes, evinced no intention or determination to reside anywhere else. Here was a *prima facie* evidence that he was domiciled there, and it was for those who claim otherwise to rebut this evidence. (*Marsh v. Hutchinson*, 2 B. & P., 231, note ; *Heidenbach v. Schland*, 10 How. Pr. Rep., 477.)

If he had not a domicile in New York, it would be difficult to say how a domicile could be proved where a person who had left his own country had thus settled. Generally speaking domicile and residence mean the same thing. And an *inhabitant* is defined to be one who has his domicile in a place or a fixed residence there. (*Crawford v. Wilson*, 4 Barb., 520.) The domicile of an infant necessarily is the same as that of his father (Story on Conflict of Laws, § 46.) The intestate was under the control of his parents, traveling with his mother to join his father at the home of the latter and of the family, and in law was actually residing in the city of

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New York. Both the father and son were inhabitants of that city, and the residence of the deceased being there the surrogate had ample authority to issue letters of administration which authorized the plaintiff to institute this action.

The General Term were right in their decision, and the order must be affirmed, and judgment absolute ordered for the plaintiff.

All concur except RAPALLO and EARL, JJ., not voting.

Order affirmed and judgment accordingly.

WILLIAM C. MURDOCK, Executor, etc., v. HARRIET ISABEL WARD, Respondent, and ISABEL GODFREY WARD, by Guardian, etc., Appellant.

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87	387
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The will of W. devised and bequeathed his residuary estate to his executors to convert into money, and, after paying debts, etc., to pay the remainder to his children, in equal shares; to his sons, their respective shares when they became of age, or thereafter, in such sums as the executors should deem best; and in case the whole principal should not be paid to them, or either of them, during their lives, then the residue to be "equally divided among and paid to the persons entitled thereto as their, or either of their, next of kin, according to the laws of the State of New York, and as if the same were personal property, and they, or either of them, had died intestate." By another clause, it was provided that if any of the children should die without issue, his or her share should go to the survivors. One of the sons died before his share had been fully paid, leaving a widow and one child. In an action for an interpretation of the will, *held* (MILLER, J., dissenting), that the widow was not entitled to any portion of the residue, but that the whole thereof belonged to the child.

*Murdock v. Ward* (8 Hun, 9) reversed.

*Merchants' Insurance Company v. Hinman* (15 How. Pr., 182), *Knickerbocker v. Seymour* (46 Barb., 198) and *Dewey v. Goodenough* (56 id., 54) distinguished.

(Argued November 20, 1876; decided November 28, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department modifying

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a judgment, entered upon a decision of the court at Special Term. (Reported below, 8 Hun, 9.)

The nature of the action and the facts are sufficiently set forth in the opinion.

*Clement D. Newman* for the appellant. The child of the deceased son took the whole of his share. (*Slosson v. Lynch*, 28 How., 417; 2 Redf. on Wills, 77; *Watt v. Watt*, 3 Ves., 244; *Garrick v. Camden*, 14 id., 372; *Cholmondely v. Ashburton*, 6 Beav., 86; *Withy v. Mangles*, 4 id., 358; *Dickens v. N. Y. C. Railroad Co.*, 23 N. Y., 158; *Quinn v. Hardenbrook*, 54 id., 83.)

*Milton A. Fowler* for the respondent. The widow of the deceased son was included in the term, "next of kin." (*Mer. Ins. Co. v. Hinman*, 15 How. Pr., 182; *Fittiplace v. Gorges*, 1 Ves., Jr., 46, 48; *Schwylar v. Hoyle*, 5 Johns. Ch., 196-206; 2 Kent's Com., 136; *Knickerbacker v. Seymour*, 46 Barb., 198-205; *Dewey v. Goodenough*, 56 id., 54; 2 Bouv. L. Dict., title "Next of kin;" 2 M. & K., 82; *Eisman v. Poindexter*, Sup. Ct. Indiana, June, 1876; 2 Law and Eq., No. 17; *May v. Fletcher*, 40 Ind., 575; 2 Redf. on Wills, 400, § 47, subd. 14.)

CHURCH, Ch. J. This action is brought by the executor of the will of James C. Ward, to procure a construction of the fourth clause of the will.

The testator, after certain specific legacies, devised and bequeathed the residue of his estate to his executors to sell and convert into money, and after paying debts and some other charges, to pay the remainder in equal shares to his children, viz., to his sons their respective shares at twenty-one, or at such time subsequently, and in such sums, from time to time, as they should deem advisable and best; and then follows this provision: "And in case the whole of said principal shall not be paid to them, or either of them, during their lives, then the said principal, or such part or portion thereof as may

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remain unpaid, to be equally divided among and paid to the persons entitled thereto as their or either of their next of kin, according to the laws of the State of New York, and as if the same were personal property and they; or either of them, had died intestate."

One of the sons died before his share had been fully paid, leaving a widow and child, and the question is whether the child takes the whole estate, or whether the widow takes a part, and if so, what part.

The Special Term held that the widow was entitled to one half, by virtue of the words "equally divided." The General Term modified this decision, and held that the widow was entitled to one-third and the child the remainder, by force of the last sentence, "and as if the same were personal property, and they or either of them had died intestate." The widow did not appeal from the judgment of the General Term, and she cannot therefore claim that it is erroneous. But the serious question is whether she is entitled to any portion of the assets under the provision quoted. If she is, I think the construction of the General Term in favor of one-third instead of one-half is the correct one, because if the last sentence quoted is to override the words "next of kin," or so modify their import as to include the widow, the word "equally" must also yield to its influence, and the distribution must be made in accordance with the statute.

The proper construction of this clause is not free from difficulty. We must not be influenced on the one hand by what we think would be a proper disposition to have been made, and on the other, we must avoid a result reached by the technical meaning of words contrary to the intention of the testator. The question is, what did he mean, and not what we think he ought to have meant.

The words "next of kin" do not legally include the widow. They mean relatives in blood. (Bouv. Dict., "Next of kin;" Redfield on Wills, 77, § 13; 2 Kent Com., 136.)

It has been considerably discussed whether these words used *simpliciter*, mean the nearest blood relations, or mean the

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next of kin according to the statute of distribution, including those claiming *per stirpes* or by representation. In *Slosson v. Lynch* (28 How. Pr. R., 417), in an elaborate and able opinion by SOUTHERLAND, J., it was decided contrary to some English authorities that the latter was the correct meaning, and I am not aware that it has been held otherwise in this State. At all events, when reference is made to the statute, the term will receive the same construction as in the statute. (Id.)

It was said in *Fettiplace v. Gorges* (1 Ves., Jr., 46), that the husband succeeds to the wife's personal estate as her next of kin, but the authorities do not support this doctrine, and Chancellor KENT says: "But from the language of the English courts it would seem to be more proper to say that he takes under the statute of distribution as husband, with a right in that capacity to administer for his own benefit, for in the ordinary sense, neither the husband nor the wife can be said to be next of kin to the other." (2 Kent's Com. 136, and cases cited.) Although the wife cannot ordinarily claim as next of kin, yet when there are circumstances in a will which induce a belief of such an intention, the term will be so construed. The counsel for the widow has referred to some authorities where this has been done.

*The Merchants' Insurance Company v. Hinman and ors.* (15 How. Pr. R., 182), decided that in the statute authorizing a creditor who had neglected presenting his claims to recover the same of the next of kin of the deceased to whom any assets shall have been paid or distributed, the term "next of kin" was not used in its strict sense of blood relation, but with a more enlarged meaning of all relations of the deceased to whom any assets had been paid. This construction turned upon the language of the statute, and reached the substance in disregard of technical words, and held the intention of the statute to be to require those who had received any part of the estate to disgorge to the extent necessary to pay the debts.

In *Knickerbacker v. Seymour* (46 Barb. 198) it was held that in a conveyance from son to father, of real and personal estate in trust, to apply a portion of the rents and profits

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(among other things) to the use and support of the grantor and his family, if he should marry and have a family, and upon his death to account for what remains to his heirs at law and next of kin \* \* \* in the manner and proportions prescribed by the statutes of descent and distribution of this State, in cases of persons who die intestate, that the widow was entitled to her share. Some stress was put upon the fact that provision was made for the support of the wife; that the grantor contemplated the relation of marriage, and must have therefore anticipated the possible contingency of leaving his wife a widow, and that under the words "heirs at law and next of kin" according to the statute of distributions, it must be presumed that he intended to include her in those words.

*Dewey v. Goodenough* (56 Barb. 54) decided that the husband should be regarded as next of kin of his wife within the three hundred and ninety-ninth section of the Code, upon the ground that he came within the "spirit" and intention of the statute. It has also been held that after a testator had made bequests to each of his four children and wife, a bequest of the residue to "my above-named heirs," was intended to include the wife. In all these cases the circumstances indicated an intention to include the wife, and thus relieve the expression used from its legal signification, and the decisions were all placed on that ground. Words are presumed to be used according to their legal signification and established meaning. If the words "as their or either of their next of kin" had not been used, the widow's right would have been clear, but can we disregard them? They are not repugnant to the statute of distribution. There is no incongruity or repugnancy in requiring distribution to the next of kin according to the statute, and hence these words must have their legal meaning, and this view seems to be sustained by the authorities.

In *Garrick v. Camden* (14 Vesey, Jr., 372), the provision was "I direct the same to be divided amongst my next of kin as if I had died intestate." Held that the widow did not take. In *Chalmondeley v. Ashburton* (6 Beav., 86), the provision was, "in trust for such person or persons as would at



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the decease of the said George James Chalmondeley be entitled to his personal estate as his next of kin according to the statutes for the distribution of personal estate of persons dying intestate, if the said George James Chalmondeley had died intestate without having been married to the said Catharine Francis." George James survived his wife Catharine Francis and married the defendant Mary E. Townsend, who claimed a distributive share. The master of the rolls said, "if the words 'next of kin' had been omitted, I should have no doubt that the widow would be then entitled, but having been inserted, I must give them full legal effect, and look for the persons whom the law designates by that expression." (See also, 3 Vesey, 244; 4 Beav., 358; 23 N. Y., 158.)

I have examined the other provisions of the will to see if an intention might be inferred to include the widow of any of the sons dying, and I do not find any thing evincing such an intention; on the contrary there is an express provision that if any of the children die without issue, his or her share shall be paid to the survivors, thus ignoring the wife of any of the sons, and the husband of any of the daughters, and evincing a clear intention on the part of the testator not to give them, as such, any portion of his estate.

It is said that the fact of issue might have changed his intention in this respect; it might, but there is no evidence and no circumstance indicating that he intended any distinction. The provision that if all the children should die without issue, the income should be paid to the testator's wife during her life, and after her death to his (the testator's) next of kin according to the statute, tends to manifest a like intent.

If we might, by a somewhat unnatural construction of the language itself, give the widow a portion of the estate, these provisions, it seems to me, furnish such evidence of a contrary intention as to prevent our doing it without overturning the fundamental rule for construing wills, of giving effect if practicable, to the intention of the testator.

Looking at all the provisions of the will it appears to me that the testator designed to keep his estate as far as practica-

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ble in the hands of those of his own blood. He has used apt phrases and words for that purpose, and, however much we might wish it otherwise, we have no alternative but to declare the law as it is.

The judgment of the General Term must be reversed and the child declared entitled to the whole estate, costs of all parties to be paid out of the fund.

All concur, except MILLER, J., dissenting.

Judgment accordingly.

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WILLIAM LIDDELL, Appellant, v. WILLIAM PATON, et. al.,  
Respondents.

This court will not review a decision denying or vacating an order of arrest where, in any view of the facts, such decision can be upheld.

(Argued November 20, 1876; decided November 28, 1876.)

APPEAL from order of the General Term of the Supreme court in the first judicial department reversing an order of Special Term which denied a motion, on the part of defendant, to vacate an order of arrest, and vacating said order. (Reported below, 7 Hun, 195.)

The action was to recover for the alleged conversion of the avails of goods consigned by plaintiff to defendants for sale, and by them sold, and instead of being remitted according to agreement, converted.

The General Term reversed the order upon the ground that the preponderance of proof was with the defendants, and established that the parties treated the indebtedness simply as an ordinary liability on contract.

*Benj. G. Hitchings* for the appellant.

*S. P. Nash* for the respondents.

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*Per Curiam.* This court will not review a decision denying or vacating an order of arrest, where, upon any view of the facts, such decision can be upheld. In the case at bar the General Term reversed the order of the Special Term denying the motion to vacate the order of arrest, on the ground that, upon the preponderance of proof, the defendants were entitled to have the order of arrest set aside, and as we are not prepared to say that their decision was wrong in this respect, within the rule laid down, the appeal must be dismissed, with costs.

All concur.

• Appeal dismissed.

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ABRAHAM HEWLETT, Respondent, v. SAMUEL A. WOOD et al.,  
Appellants.

Where an order of Special Term, denying a motion involving a question of discretion, states that it is denied solely upon the ground of want of power, and the General Term affirms the same without qualification, it affirms it in all its parts, including the ground upon which, by its terms, it was granted, and its order is appealable to this court. The order cannot be qualified by reference to the opinion of the court.

In such case, if it is here determined that the court below erred in its decision as to power, the order will be reversed and the proceedings remitted to the court below for the exercise of its discretion.

*It seems* that the question whether a party should be deprived of the benefit of the testimony of a witness, examined *de bene esse*, for the reason that the adverse party has lost the opportunity of a full cross-examination, should be determined upon the trial, rather than upon motion, where the facts necessary to present the question appear in the deposition as certified to.

Where, however, the question depends upon facts not appearing upon the face of the deposition or the certificate, but which must be established by evidence *aliunde*, a motion to suppress the deposition would be proper.

As to whether, in such case, evidence could be given on the trial of the facts alleged, *quære*.

The deposition may, in the discretion of the court, be suppressed on motion in advance of the trial.

Where the opportunity to cross-examine the witness has been lost through

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his misconduct, or through the fault or omission of the party on whose behalf he is examined, or other like cause, the deposition should be set aside or the testimony rejected.

(Argued November 21, 1876; decided November 28, 1876.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order of Special Term denying a motion to suppress the deposition of defendant Samuel Wood, taken on behalf of plaintiff *de bene esse*.

The examination was had before a justice of the Supreme Court; the direct examination was completed and the cross-examination commenced, but, in consequence of the indisposition of the witness, was postponed from time to time, and the deposition was finally certified to by the judge, returned and filed. Defendants, Samuel A. Wood and others, moved that the deposition be suppressed, which motion was denied. Said defendants appealed, and the General Term, by order dated March 10, 1876, modified the order of Special Term, so as to direct "that the deposition be taken from the files and returned to the justice before whom it was taken, in order that he may proceed with the cross-examination of said witness, Samuel Wood, and close the same and complete the said deposition according to the understanding existing and the direction of said justice when the parties were before him \* \* \* on the 15th day of May, 1875."

The deposition was accordingly taken from the files and returned to the justice. Repeated efforts for a further cross-examination were made, but without success. The deposition was signed by the witness, and the justice again returned the same with a certificate annexed, which, after stating the facts of the examination, subscription, etc., closed as follows: "And I having, on the 18th day of March, instant, declared the examination of said Wood duly closed, do make the certificate in conformity with said statute." Defendants, Samuel A. Wood and others, again moved, upon affidavits, to suppress the deposition, upon the grounds that it was not com-

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pleted ; that the certificate was signed contrary to the stipulation of the parties and the direction of the justice, and that the deposition was never read over or subscribed by the witness after the examination was declared closed. The order thereon, after reciting the making of the motion, etc., continues as follows : " And the plaintiff thereupon having taken and made a preliminary objection to the motion being entertained on the ground that the examination of the said witness, Samuel Wood, had been closed by the order of the Hon. CALVIN E. PRATT, the justice before whom the same was taken, and the said deposition completed and duly certified and filed, and that this court at Special Term could not review his decision and act in closing said examination ; and after hearing Edward T. Schenck, of counsel for the plaintiff, in support of said objection, and Abram Wakeman, of counsel for the defendants, moving herein in opposition, and after due deliberation being had, it is ordered that the said preliminary objection be and the same is hereby sustained, and that the said motion to suppress be and the same is hereby denied, but without prejudice to the rights of the defendants to interpose any and all objections to the use of said deposition on the trial, which rights are hereby reserved."

The moving parties appealed. The General Term "ordered and adjudged that the said order so appealed from be and the same is hereby affirmed."

*Abraham Wakeman* for the appellants.

*Edward T. Schenck* for the respondent. The order of the General Term was not appealable. (*Howell v. Mills*, 53 N. Y., 313, 315 ; 59 id., 331 ; *People v. N. Y. C. Railroad Co.*, 29 id., 418, 428 ; Code, §§ 11, 391, 392 ; *Rust v. Eckler*, 41 N. Y., 488, 497 ; *Sheldon v. Wood*, 2 Bosw., 267, 280 ; *Fisher v. Hepburn*, 48 N. Y., 41, 52-54 ; *Camp v. Camp*, 59 id., 212, 215, 217, 221 ; *Plate v. Kelly*, 16 Abb., 188 ; *Gibson v. Pearsall*, 1 E. D. S., 90 ; *White v. McLean*, 57 N. Y., 670 ; 47 How., 193, 197.) A party shall not be deprived of the testi-

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mony of a witness called out in the examination in chief, unless the opportunity to cross-examine is lost through the misconduct of the witness or the fault or neglect of the party calling him. (*Forrest v. Kissam*, 7 Hill, 463; *Clements v. Benjamin*, 12 Johns., 299; 2 Cow. Tr., 981.)

ALLEN, J. Whether the respondent should be deprived of the benefit of the testimony of the defendant Samuel Wood, examined *de bene esse* as a witness in his behalf, for the reason that the adverse party has lost the opportunity of a full examination, should be determined at the trial, where an exception can be taken, rather than upon an interlocutory motion. The deposition may, in the discretion of the court, be suppressed, on motion in advance of the trial, if the case falls within the principle, that when an opportunity to cross-examine a witness has been lost through the misconduct of the witness or the fault or omission of the party calling him, or any other like cause, the deposition should be set aside or the whole testimony should be rejected. (*Forrest v. Kissam*, 7 Hill, 463.) Mere formal defects or irregularities in the examination of a witness out of court or upon commission, will be disregarded upon the trial; but any matter of substance affecting the rights of the parties, and especially any act of the party or of the witness, by which the party is deprived of the valuable right of cross-examination, will be good reason for rejecting the evidence. (*Forrest v. Kissam*, *supra*; *Rust v. Eckler*, 41 N. Y., 488; *Kimball v. Davis*, 19 Wend., 437.) The court below very properly reserved to the present appellant the right to interpose any and all objections to the use of the deposition on the trial; and if the facts relied upon appear or shall be made to appear upon the face of the deposition as certified by the judge by whom it was taken, the legal rights of the appellant would be sufficiently guarded. The difficulty, and the only difficulty, is that the objection of the appellant to the deposition, in its present form, depends, so far as we can discover from the papers before us, upon extrinsic facts, facts not appearing upon the face of the deposition or the cer-

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tificate of the judge, and which would have to be established by evidence *aliunde* ; and it is at least questionable whether evidence could be given, on the trial, of the facts alleged. It might, perhaps, be admissible, in the discretion of the judge, to try the collateral issues, but it would be unusual, and might embarrass, or prove a hindrance, to the trial of the main issue. Perhaps it will appear, by an inspection of the papers on file, that every fact necessary to raise the question is spread out on the deposition, as certified by the judge. We cannot certainly know from the papers before us. It was evidently the intention of the learned judges of the Supreme Court to secure to the appellants all their substantial rights ; and if they have not done so they can, should the proceedings be remitted, do so, unless they determine to suppress the deposition on this application by requiring a return by the judge of all the proceedings had before him, including the adjournments and the reasons of the adjournments and the evidence of the medical witnesses as to the physical and mental condition of the witness. By the order of the Supreme Court of March 10, 1876, modifying the order of the Special Term from which appeals had been taken, the deposition was directed to be taken from the files of the court and returned to the judge by whom it was taken, in order that he might proceed with the cross-examination of the witness and complete the deposition, according to an understanding existing between the parties and the direction of the judge when the parties were before him in May, 1875. This order was a recognition of the fact that the deposition had not been completed and that the right to cross-examine the witness existed. Under this order no further examination of the witness was had, although repeated attempts in that direction were made. The reason of the failure to continue the examination was the alleged physical disability of the witness, and the learned judge again certified the deposition as far as it had before then been taken, and refiled the same, believing that the witness would not again be competent to be further examined. Whether the deposition as filed, if incompetent as evidence

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by reason of the loss of opportunity to cross-examine the witness, should be suppressed on motion, or left for the action of the trial court, was discretionary in the Supreme Court; and no appeal would lie from an order denying an application to suppress it; and had the motion been decided upon this ground, and in the exercise of this discretion, the appeal would necessarily be dismissed. (*Anon.*, 59 N. Y., 313.) The learned judge, taking the deposition included in his certificate of April 15, 1876, made, after the efforts to examine the witness pursuant to the order of the court referred to, in addition to matters required by statute to be certified, a statement that "he had declared the examination of said Wood duly closed." This declaration was *ultra vires*. He acted ministerially in taking and reducing the evidence of the witness to writing. He could not judicially determine any question that might be made, or control the counsel in the examination of the witness. The statute prescribes his duty, and is mandatory, compelling him to insert in the deposition every answer or declaration of the witness examined which either party should require to be included therein. (2 R. S., 399, § 37.) Upon the present motion being made at Special Term, the preliminary objection was taken that the examination had been closed by the judge by whom it was taken, and that the court could not review such decision and act in closing the examination, and the objection was sustained and the motion denied solely for that reason, viz., a want of power of the Special Term to review that declaration of the judge in closing the examination, and the reason is assigned in the order. The order of the General Term merely affirms that order, and in affirming the order without qualification or modification, it affirms it in all its parts, and the grounds upon which, by its terms, it was granted. The order cannot be qualified in its operation and effect by reference to the opinion of the court. The court speaks by its order, and effect must be given to it according to its terms. If the order appealed from was made in the exercise of the discretion of the court, the appeal must be dismissed; but if granted by reason of supposed want of power,



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as it seems to have been, it must be reversed, and the proceedings remitted, that the court may, in its discretion, make such disposition of the application as shall be deemed proper. It was the duty of the court below to decide the motion upon its merits, and in the exercise of the discretion vested in it. Perhaps the court at General Term did intend to pass upon the merits and not to deny the application upon the preliminary objection which prevailed at Special Term; but if so, the order should have so declared.

The order of the General and Special Terms must be reversed, and the proceedings remitted to the Supreme Court, to the end that it may proceed and consider the application on its merits.

All concur; MILLER, J., in result.

Ordered accordingly.

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FANNY KYLE, et al., Appellants, v. GEORGE A. KYLE,  
Executor, etc., Respondent.

The provisions of the Revised Statutes giving a widow damages for withholding dower (1 R. S., 742, § 19, *et seq.*), were intended to prescribe the sole rule to determine the amount thereof; and by and under the statute alone can she now recover, either at law or in equity.

As to whether an executor of an heir at law has the right to charge the estate of his testator, or expend the assets in his hands, for the payment of arrears of dower, where dower has not been assigned, *quære*.

J. died in 1858, intestate, leaving a widow and five children. G. and D., two of the children, bought out the interests of the others in certain real estate of which J. died seized, and subsequently G. conveyed his interest to D. D. died in March, 1871, leaving a will of which G. was executor; he, in January, 1873, allowed to the widow of J., for the arrears of her dower, the value of the use of one-third of the real estate for six years prior to the testator's death, and gave his promissory note to her for the amount, deducting a sum paid by the testator in his lifetime. No dower had been admeasured or demanded, and no action to recover the same had been commenced. The amount of the note was allowed to the executor on settlement of his accounts by the surrogate. *Held*, error; that the allowance, if it could be sustained at all, must stand in the place of a judgment for damages; and, as the said statute (§ 20) only allows damages to be estimated for six years prior to a judgment therefor, the allowance could only be for a period beginning six years

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prior to the time it was made, and ending at the testator's death, about four years and two months; also, that as, by said statute (§ 20), the widow is only entitled to recover damages of other persons than the heirs of her husband, from the time of demanding dower of them, and as, although the testator was an heir, yet he inherited but an undivided one-fifth, and derived title to four-fifths of the lands by grant, for the value of the use of those four-fifths he was liable only from the time demand was made; and, no demand having been made, he was only liable for one-fifth of the use for the period above stated; and that, therefore, the executor had no authority to pay the widow her damages out of the assets of the estate, upon the basis adopted, still less to charge the estate by an executory contract to make such payment.

In the deed from the three other children to G. and D., it was stated to be the intent to leave the right of dower in the lands to be adjusted and arranged by the grantees. *Held*, that the obligation thus imposed upon the grantees was joint, and G. had no right or power, as executor of the estate of D., to put the whole burden upon it to the relief of himself. A surrogate has jurisdiction to hear and adjudge upon a claim of an executor against the estate of his testator, whether the same be disputed or not.

A petition of appeal from a surrogate's decree settling the accounts of an executor, allowing, among other things, a claim of the executor against the estate, of \$1,500, stated, as one ground of appeal, that the surrogate erred in adjudging that the estate was indebted, upon the proofs, to the executor for the sum so allowed. *Held*, that it was error for the General Term to decline to pass upon the sufficiency of the evidence to sustain the decree; and that, in reviewing the judgment of the General Term, it was the duty of this court to look into the testimony and to determine that question.

*Kyle v. Kyle* (3 Hun, 458) modified.

(Argued November 20, 1876; decided December 5, 1876.)

THESE are cross-appeals from an order of the General Term of the Supreme Court, in the fourth judicial department, modifying a decree of the surrogate of Cayuga county, and remitting the case for further proceedings. (Reported below, 3 Hun, 458.)

The decree was upon final settlement of the accounts of the executors of David Kyle. The executors, George A. Kyle and William Mersereau, filed separate accounts. The former also filed an individual account against the executor. One item in his account was for \$1,300, alleged to have been paid to Mary Kyle, widow of John Kyle, in satisfaction of her claim

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for arrears of dower in certain real estate of which her husband died seized. One item of the individual account was \$1,500, for an interest in certain personal property alleged to have been sold by the executor to his testator during his lifetime. This item was contested by the widow and child of the testator, who claimed, upon the hearing, that the surrogate had no jurisdiction to hear disputed claims of this nature. These two items were allowed by the surrogate, and are the only ones in question here.

The facts in regard to the first item are these: Said John Kyle died intestate, January 23, 1857, leaving said Mary Kyle, his widow, and five children him surviving, among whom were the said testator David Kyle, and the said executor George A. Kyle. The said intestate died seized of a farm, known as the "Benedict farm." In March, 1857, the other children conveyed by deed to George and David their interest in said farm. The deed contained this clause: "This conveyance is intended to leave the right of dower of Mary Kyle, to be adjusted and arranged by the parties of the first part." No arrangement was made with the widow; no dower assigned, and no action commenced for the recovery thereof. In June, 1865, said George A. Kyle sold and conveyed his interest in the farm to David. David paid to his mother the sum of \$500. Upon the settlement, said George A. Kyle presented, as a voucher for the first item, a claim presented by his mother, as follows:

"THE ESTATE OF DAVID KYLE, DECEASED, TO MRS. MARY KYLE, DR.

"To the use and net profits of her interest in the farm owned by the late David Kyle, deceased, for six years previous to the death of the said David Kyle, on the 17th day of March, 1871, at the rate of \$300 per year, \$1,800, deducting, as near as I can state, during the six years, the sum of .....

\$500 00

\$1,300 00"

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With her receipt for the amount dated January 24, 1873, It appeared that he gave to her his promissory note for the amount.

The widow and child of the testator appealed from the surrogate's decree. In the petition of appeal one ground stated is as follows:

"That the said surrogate also erred in assuming jurisdiction to hear, try and determine the contested claim of the said George Kyle, against his deceased brother's estate, of \$1,500, against the objection of your petitioners, who desire to try the same before a competent court and jury; and also in adjudging that the said estate was indebted, upon the proofs, to the said George Kyle, for the said \$1,500, and in ordering that it be paid to him, as will appear by said decree rendered."

The General Term reversed the decree as to the \$1,300 item, sustaining it as to the item of \$1,500, and remitted the case to the surrogate for further proceedings. Both parties appealed to this court.

*Jas. R. Cox* for the plaintiffs. A widow, claiming dower, has no estate in the land of her husband until the same has been admeasured. (2 Bouv. Inst., § 1765; 4 Kent's Com., 61, 62, and note; *Green v. Putnam*, 1 Barb., 506; *Scott v. Howard*, 3 id., 319; *Lawrence v. Miller*, 2 N. Y., 245; *Yates v. Paddock*, 10 Wend., 528.) Her claim is not assignable. (*Ritchie v. Putnam*, 13 Wend., 524.) The adjudication by the surrogate upon the disputed claim of defendant for the undivided half of the personal property on the farm in June, 1865, was without jurisdiction and void. (*Magee v. Vedder*, 6 Barb., 354; *Wilson v. Bapt. Soc.*, 10 id., 316, 318; *Disosway v. Bank*, 24 id., 64; *Cooper v. Felter*, 6 Lans., 484; *Tucker v. Tucker*, 4 Keyes, 149; *Curtis v. Stillwell*, 32 Barb., 354; *Andrews v. Walledge*, 17 How. Pr., 263; *Campbell v. Thatcher*, 54 Barb., 385; 15 Abb. Pr., 31.)

*E. A. Woodin* for the defendant. Defendant could settle and compromise with the widow her claim for dower, although

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it had never been in fact assigned. (Tyler on Infancy and Coverture, 626; *Johnson v. Thomas*, 2 Paige Ch., 384; 1 Story's Eq., 597; *Coates v. Cheever*, 1 Cow., 479.) The surrogate had jurisdiction to hear, try and determine defendant's claim against the estate of his testator. (R. S. [Edm. ed.], 90, § 33; Laws of 1837, chap. 460, § 37, as amended by Laws of 1868, chap. 594; *Jumel v. Jumel*, 7 Paige, 591; *Gardner v. Gardner*, id., 112; *Williams v. Purdy*, 6 id., 166; *Robinson v. Raynor*, 28 N. Y., 494.)

FOLGER, J. We agree with the General Term that the surrogate erred in allowing to the executor the amount of the promissory note made by him to Mary Kyle. The reasons, as far as they are given by the General Term, are sound. The learned counsel for the executor claims that they present but a partial view, and that the action of the executor will be upheld in equity, and says that equity will give aid to a dowress after her remedy at law is gone, and cites *Johnson v. Thomas* (2 Paige, 384), and other authorities to the same end as that. He claims that equity treats the heir at law of the premises as a trustee for the widow of her arrears of dower. But that is not the sole question here. Another is, can a widow claim and recover rents and profits of her dower until it has been assigned? And further than that, has an executor of the heir a right to charge the estate of his testator, or expend the assets in his hands, for the payment of such arrears in such case? Equity was wont, before the Revised Statutes gave the widow a better remedy at law for her dower and the rents and profits than was theretofore furnished, to entertain her bill for an assignment of her dower, and gave it either by metes and bounds, or an alternate use of the property, or an assignment of a third of the rents and profits, or by a gross sum reckoned by the annuity tables; as the circumstances of the case required, (see *Coates v. Cheever*, 1 Cow., 476), and in so doing it held the heir at law, or devisee of the premises, as trustee for her of the arrears, though dower had not been demanded. And when she had died before she had established

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her right, there was, in favor of her representatives, decreed an account of rents and profits since the time her right had accrued. But we are not aware that this has been done in this State, save in an action brought by her for an assignment of dower, and as an incident to it. No express authority that it has been, or can be done, has been produced to us by counsel. It has been strongly intimated in Maryland that it will not. (*Kiddall v. Trimble*, 1 Md. Ch. Dec., 143.) It has been held in Mississippi that it will (*Harper v. Archer*, 28 Miss. 212), but without elaborate consideration, and the authorities cited (viz., Story's Eq. Jur., §§ 625, 626; Park on Dower, 352; Fonbl'q Eq. Book, 1, ch. 3, § 3), when sifted, do not sustain the decision, and go no further than that where the widow or tenant has died pending suit, before arrears of dower have been ascertained and awarded, a court of equity will revive the suit in favor of her, or against his, representatives, to enable a recovery of the arrears. The principle is, that the dower is the principal thing, and the rents and profits merely accessory and consequential. Until the right to the principal is established and it obtained, that which is only incidental cannot be had. The Revised Statutes of this State, in declaring the right of the widow to recover damages for withholding dower, say that they shall be estimated in the suit for the recovery of the dower. (1 R. S. 742, §§ 19, 20.) There are other considerations growing out of the statutes, which bear upon this question, and upon the existence of a legal or equitable obligation upon the estate of the testator to pay this claim. The statute gives a widow damages for withholding, to be recovered in the action in which she shall recover her dower. (1 R. S., p. 742, § 19.) It permits the damages to be estimated to the time of recovering judgment therefor, but not to exceed six years in the whole in any case (id., § 20), that is to say, for no more than six years prior to the judgment. As the widow here had no judgment, the allowance made to her by the executor must stand, if it stands at all, in the place of a judgment, and the time for which she could be allowed must be for six years prior to that date. The allowance took place

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January 24, 1873, and the six years would run back to that date in 1867. The testator died in March, 1871, about the seventeenth, so that no more could by the statute be had of his estate, than for a period beginning January 24, 1867, and ending with his death, or about four years and two months. But the executor did allow for a period of six years before the testator's death, thus charging the estate with more than the statute law would exact of it. The basis of the allowance was, that the value of the use of the third was \$300 per year, or \$1,800 in all; from which was deducted \$500, which it was admitted by the widow had been paid by the testator in his lifetime. As his estate in 1873 was liable for no more than about four years' arrears, which would be about \$1,200, the deduction of \$500 would leave but about \$700 to be paid, instead of the \$1,300 claimed to have been paid. Again, by section 20 (*supra*), the widow is entitled to recover damages of the heir from the time of the death of her husband, and of other persons from the time of demanding her dower of such persons. Now the testator, though an heir of the widow's husband, was not an heir of the whole farm. He inherited but an equal undivided fifth. As to the other four parts he was a grantee of the other heirs, of whom the executor was one. And for the value of the use of these four parts, he was, by statute, liable only from the time that dower was demanded of him. But dower was never demanded of him. So that his estate was liable, in any view, under the statute, but for one-fifth of \$300 per year, for four years and a little over, or for not much over \$240.

These provisions of the statute, even if taken in the nature of statutes of limitation, are to be observed both at law and in equity, for equity as a general rule follows the law in such cases. (1 Story Eq. Jur., § 64 *a.*) It is apparent then, how inconsiderate on the part of the executor, and how inequitable to the estate, was the arrangement he made with the widow. It is claimed that equity is not bound by statutes in this matter. (*Johnson v. Thomas, supra.*) But at the common law, a widow was entitled to damages from the time only when she

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recovered her judgment for her dower. It was by statute that she first became entitled to arrears. Though equity has asserted a freedom from that statute, we think that by the Revised Statutes it was meant to prescribe the sole rule for the amount thereof, both at law and equity, and that it is now by statute alone in this State that she may recover, either at law or equity. Certainly equity is bound by the statutory limitation of twenty years for the demanding of her dower. (1 R. S., 742, § 18.) By the Revised Laws (1 R. L., 60, § 1) she might prosecute at any time in her life. The revisers meant to limit the right in accordance with the law as to other claims to real estate, (5 R. S. [Edm. ed.], 504), and their notes show that they sought a like end of public policy in fixing the amount of arrears that might be recovered. (Id.) The reason why equity in former times did not limit the widow to any period in her recovery of arrears, was that there was no limitation at law. (*Oliver v. Richardson*, 9 Ves., Jr., 221). Now, in England, equity follows the statute. (*Bamford v. Bamford*, 5 Hare, \*203.) The rule should be the same here. In the absence of a judgment for dower, without action brought therefor, in the absence of any demand of dower, without explicit contract shown with the widow to pay for the use of it, we do not perceive the right of the executor to pay the widow therefor upon the manifestly illegal basis adopted by him, out of the assets of the estate, and still less to charge the estate directly or indirectly by an executory contract to make such payment.

We do not lose sight of the clause in the deed from three of the co-heirs at law to the brothers, the testator and executor. Doubtless it created an obligation from the grantees in the deed to the grantors. It may be that in equity the widow could avail herself of it, but only in accordance with its terms. The obligation is joint, upon George the executor, as well as David the testator. The personal obligation yet bears upon George, as much as upon the estate of David. George had no right or power as executor of the estate, to put the whole burden upon the estate, to the relief of himself.

To avoid misapprehension, it is well to say, that we intimate



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no opinion as to the right of the widow of John Kyle, if now alive, to sue for and recover her dower, with such arrears as the law allows.

We agree with the General Term, also, that the surrogate had jurisdiction to hear and adjudge upon the debt alleged to be due from the testator to the executor. The statute forbids the executor to retain any part of the property of the testator for the satisfaction of his own debt or claim, until it shall have been proved to, and allowed by, the surrogate. (2 R. S., 88, § 33.) It has been held that the proof must be other than by his own affidavit. (*Williams v. Purdy*, 6 Paige, 168.) It must be by the testimony of witnesses and all or any of the evidence known to the common law, to be produced by him. It would be absurd to say that the surrogate was restricted in his inquiry, to the testimony of witnesses brought by the executor. If he is to take proof, and allow the debt or claim only after it is proven to his satisfaction, he must be permitted to hear also the testimony brought against the claim by those interested adversely to it. It is the result of the statute, giving him jurisdiction to allow upon proof, that he has such power. It is true, that he may not adjudicate upon a disputed claim of an alleged creditor of the estate. But the cases are not alike, for there no statute gives him the power. (*Tucker v. Tucker*, 4 Keyes, 148.)

It has been held that the surrogate may hear and determine upon a claim against the executor in favor of the estate. (*Gardner v. Gardner*, 7 Paige, 112.) It is for the reason, that unless he may do so, those interested in the estate have no remedy save by bill in equity, inasmuch as no suit at law can be brought; for the executor, who is the legal representative of the estate, cannot sue himself. The same reason is applicable here, and is probably the base of the statute cited.

We do not agree with the General Term, that this was the only point available to the appellants, Fanny Kyle and her son, upon this branch of the case. We think that the General Term should have passed upon the sufficiency of the evidence, to sustain the decree of the surrogate allowing the

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claim of the executor. Their petition of appeal distinctly presented as one ground of appeal, that the surrogate erred in adjudging that the estate was indebted, upon the proofs, to George Kyle for the \$1,500.

In reviewing the judgment of a General Term on an appeal to it from the decree of a surrogate in such case, this court must look into the testimony, and reach a conclusion upon the facts of the case, and determine whether the adjudication of the surrogate was sustained thereby. (*Robinson v. Raynor*, 28 N. Y., 494.) We must therefore look into the case to see whether or not the claim of the executor is sustained.\*

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The judgment of the General Term should be affirmed as to the disallowance of the arrears of dower, and reversed as to the rest of the judgment, and be remitted to the surrogate for a new hearing on the claim of the executor. The question of costs to be disposed of by the surrogate.

All concur.

Ordered accordingly.

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THE SISTERS OF CHARITY OF ST. VINCENT DE PAUL, Respondent, v. MARY KELLY et al., Appellants.

87	400
124	457
124	457

Where the name of a person appears to an instrument purporting to be his will, and he acknowledges to witnesses that it was subscribed by him, or for him, and adopted by him, it is a good subscription of the paper as a will; but in the absence of a subscription in the presence of the witnesses, there must be substantially such an acknowledgment.

The provision of the statute of wills (2 R. S., 63, § 40), requiring a testator to subscribe "at the end of the will," means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion following the signature, it is

\* The omitted portion of the opinion is taken up with an examination and discussion of the evidence, which is not deemed of sufficient general importance to require its reproduction in this report.

## Statement of case.

not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will.

John Kelly presented to two persons a paper, which he stated he had drawn as his will, and requested them to witness it. The last clause of the instrument was as follows: "I make, constitute and appoint Edward McCarthy to be executor (*J. Kelly*) of this my last will and testament, hereby revoking all former wills by me made." There was no evidence that the testator wrote the name "*J. Kelly*," save his statement as to drawing the will. After the two witnesses had signed, Mr. Kelly wrote his name, in the attestation clause, so that it read: "Subscribed by *John Kelly*, etc." There was no other signature. *Held*, that a refusal to admit the instrument to probate was proper; that the signature in the attestation clause was not a due execution, as it was written after the witnesses had signed their names; that the writing of the name "*J. Kelly*," in the last clause, if written by the testator, was not a valid subscription: First. Because he did not present that name to the witnesses for their attestation, and the subsequent signing precluded the idea that he wrote it or adopted it for his signature to the paper as a will. Second. Because the place where the name appears is not the end of the will.

*Sisters of Charity v. Kelly* (7 Hun, 290) reversed.

*Baskin v. Baskin* (36 N. Y., 416), *Willis v. Mott* (36 id., 486), *In re Woodley* (8 S. & T., 429), *In re Cassmore* (1 L. R. Pro. & Div., 1) distinguished.

(Argued November 22, 1876; decided December 5, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing a decree of the surrogate of the county of New York, which adjudged that an instrument presented for probate as the last will and testament of John Kelly, deceased, was not properly executed and attested, and refused to admit the same to probate, and remitting the proceedings to said surrogate, with instructions to admit the same to probate. (Reported below, 7 Hun, 290.)

Of the last clause of the instrument, so presented for probate, and the attestation clause, the following is a copy, with the signatures as they appear:

"Likewise, I make, constitute and appoint Edward McCarthy to be executor (*J. Kelly*) of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof, I have hereunto subscribed my name

## Statement of case.

and affixed my seal, the 24th day of July, 1874, in the year of our Lord one thousand eight hundred and sixty.

“*Witnesses :*

“EDWARD MCCARTHY.

“DANIEL VAN CLIEF.

“Subscribed by John Kelly, the testator named in the foregoing will, in the presence of each of us, and at the time of making such subscription the above instrument was declared by the said testator to be the last will and testament, and each of us, at the request of said testator, and in ——— presence, and in the presence of each other, sign his name as a witness thereto at the end of the will.

“Residing at 7 Clark street.

“Residing at No. 11 Sullivan street.”

The instrument was partly printed and partly written.

It appeared from the evidence of the witnesses, McCarthy and Van Clief, that the testator presented the instrument to them, saying: “I drew up a will for fear any thing might happen me before coming back; in case there was any discussion about the trifle of money I have, I want you to witness this will.” At the time, the name “J. Kelly” was written in, as it appears, in the last clause. The witnesses then signed their names, and thereafter the testator wrote the name “John Kelly,” as it appears in the attestation clause. Further facts appear in the opinion.

*Otto Horwitz* for the appellants. The witnesses to the will should have signed after the will was signed by the testator. (*Jackson v. Jackson*, 39 N. Y., 153, 163.) The will was not signed by the testator at the end, as required by the statute. (Redf. L. and Pr. Sur. Courts, 75, 76; Wms. on Exrs., 65; *Smee v. Bryer*, 6 Notes of Cases, 420; *In re Milward*, 1 Curt., 912; *McGuire v. Kerr*, 2 Bradf., 244, 257; *Remsen v. Brinkerhoff*, 26 Wend., 325; *Heady's Will*, 15 Abb. Pr. [N. S.], 211–219; *Jackson v. Jackson*, 39 N. Y., 153; *Hoyssradt v. Kingman*, 22 id., 372.) A will must be signed by the testator, in the presence of each of the witnesses, or the signature

## Statement of case.

acknowledged by him to have been made in their presence. (2 R. S., 7, § 40; *Chaffee v. Bap. Mis. Cor.*, 10 Paige, 85, 92; *Remsen v. Brinkerhoff*, 26 Wend., 331; *Lewis v. Lewis*, 11 N. Y., 220.)

*James A. Deering* for the respondents. The will was properly subscribed by the testator and the witnesses. (*McGuire v. Kerr*, 2 Bradf., 257; Redf. on Wills, 703; *Conboy v. Jennings*, 1 S. C. R., 622; *Cohen's Estate*, 1 Tuck., 286; *Hitchcock v. Thompson*, 13 S. C. R., 279; *In re Gilman*, 38 Barb., 364; *Tounele v. Hall*, 4 N. Y., 140; *Thompson v. Quinby*, 2 Bradf., 449; *In re Duane*, 8 Jur. [N. S.], 752; *In re Woody*, 3 Sw. & Tr., 429; *In re Cooms*, L. R., P. & D., 302; *In re Baker*, Prerog. Ct., 1844; 3 Notes of Cases, 162; 2 Pars. on Cont., 515; 4 East, 130; 3 Sandf., 318; 17 N. Y., 194; 14 M. & W., 794; 1 Redf. on Wills, 208, 209; *Winson v. Pratt*, 5 J. B. M., 484; *Roper v. Franklin*, 6 Grat., 1; *Rucker v. Lambdon*, 12 Sw. & M., 230; *Secherest v. Edwards*, 4 Metc. [Ky.], 163.) The subscription of the testator, and the acknowledgment thereof to the attesting witnesses was in conformity with the statute. (*Harrison v. Harrison*, 36 N. Y., 486; *Baskin v. Baskin*, id., 416; *Butler v. Benson*, 1 Barb., 526; 1 Jarm. [ed. 1861], 74; *Ellis v. Smith*, 1 Ves., Jr., 11; 1 Redf. on Wills, 209-211; *Armstrong v. Armstrong*, 29 Ala., 538; *Rosser v. Franklin*, 6 Grat., 1; *Dudley v. Dudley*, 3 Leigh., 436; *Bone v. Spear*, 1 Philim., 345; *Tone v. Castle*, 1 Curt., 303; *Dewey v. Dewey*, 1 Metc., 349; *Nicherson v. Brick*, 19 Cush., 332; *Tilden v. Tilden*, 13 Gray, 110; *Todd v. Thompson*, 9 L. T. [N. S.], 177; *Hall v. Hall*, 17 Pick., 373.) The declaration of the testator, at the time of acknowledging the signatures, that the paper was his last will and testament was sufficiently within the statute. (*Hunn v. Case*, 5 N. Y. Surr., 307; *Van Hoosier v. Van Hoosier*, id., 365; *Hunt v. Moobrie*, 3 Bradf., 322; *Tunnison v. Tunnison*, 4 id., 138; *White v. Trustees*, 6 Bing., 310; *Risben v. Hicks*, 3 Bradf., 353; *Nipper v. Groesbeck*, 22 Barb., 670.) The absence of a seal was not fatal. (*In re Diez*, 50

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Opinion of the Court, per FOLGER, J.

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N. Y., 88.) This is a case where mere technical objections should be rejected. (Redf. on Wills, 212, 213 ; *In re Walker*, 1 Sw. & Tr., 653 ; *In re Cassmore*, 1 L. R., 653.)

FOLGER, J. It is clearly proven, that the witnesses to the instrument saw no act of signing it, by the deceased, until after they had signed their own names to it.

It is the law of this State that a subscription of a will by a testator, after the witnesses have signed their names to it, is not a due execution of it by him. (*Jackson v. Jackson*, 39 N. Y., 153.)

But it is not a requisite that he should subscribe the will in their presence. If he has subscribed his name in the proper place before they are called in, and then acknowledges to them such subscription to have been made by him, it is, so far, an execution in due form. (2 R. S., 63, § 40, sub. 2.)

Now the name "*J. Kelly*" did appear in this instrument before the witnesses put their names to it. It did not expressly appear that that name was written by the testator, though perhaps it may be legally inferred that it was, from his declaration that he "drew up" the paper. There is no oral proof other than this that it was his handwriting. If a deceased person's name appear to an instrument purporting to be his will, and he acknowledge to the witnesses that name to have been subscribed by him, or subscribed for him at his request or with his consent, and adopted by him as his own act, it is a good subscription of the paper as a will. In the absence of a subscription in the presence of the witnesses, there must be substantially such an acknowledgment ; and the law will not deem sufficient proof of subscription that which does not come up to this. (*Chaffee v. Bap.*, *Miss. Conv.*, 10 Paige, 85 ; *Lewis v. Lewis*, 11 N. Y., 220.) *Baskin v. Baskin* (36 N. Y., 416), does not conflict with this view. In that case there was proof, by one witness, of the actual signature by the testator ; and it is there said that the testator must verify the subscription of his name as authentic, and stress is laid upon his production of the paper to which he had personally affixed

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Opinion of the Court, per FOLGER, J.

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his signature. Now here the deceased made no reference to the name "*J. Kelly*," as his act of subscription. He did not tender the paper to the witnesses as a will completed by him. He went through the form of subscribing his name in another place in their presence, and, so far as the testimony shows, meant that subscription as his act of authentication. This does not come up to the requirement in *Baskin v. Baskin*. He did not present to the witnesses that name, "*J. Kelly*," in the middle of a sentence, for their attestation. He might have done so, and did the testimony give reason to hold that he did, the case would be somewhat like *In re Walker* (2 Swaby & Tristram, 354), cited by the learned justice at General Term. But instead of doing so, he wrote his name, in another mode of signature, in another place. In *Willis v. Mott* (36 N. Y., 486), the proof of subscription was made out, in part, from the attestation clause, which was explicit that an acknowledgment of the subscription relied upon was made to the witnesses. The signature of the testator relied upon was proven to be in his handwriting. The testator acknowledged to one of the witnesses that he had signed the will. Another saw that signature, and knew that it was signed by the testator. A third witness was dead, but had signed the attestation clause, which expressed a direct acknowledgment of subscription. It is a different case from this. Here there was no reference to the name "*J. Kelly*" by the deceased or the witnesses orally, or by an attestation clause. The subsequent signing of his name, though out of the usual place, with the purpose of completing the instrument by him, precludes the idea that he had made the name "*J. Kelly*" for his signature to the paper as a will, or that he adopted it as such. In each of the cases in 36 New York (*supra*), there is an adoption of the name relied upon for a due subscription of the will, and that name is shown to be the genuine signature of the testator. That adoption was by some unequivocal declaration. There is lacking in the case in hand, an unequivocal act or declaration adopting, as his subscription to the instrument, the name now relied upon to obtain probate.

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Opinion of the Court, per FOLGER, J.

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Besides this, it may not be said that the end of the will is at the place where the name "*J. Kelly*" appears. There follows it quite important parts of a will—the nomination of an executor, and the revocation of former wills. It is said that the whole testamentary disposition preceded that name, and that on rejecting the part naming an executor, there can be appointed an administrator with the will annexed. We cannot be sure that such was the purpose of the testator. There are cases, in which quite a material part of the intention and forecast of the testator, centers in the selection of persons to execute his testamentary purpose; where important trusts are created in behalf of natural persons, important charitable institutions are founded, or other large and far-reaching designs are shaped, and the administration and execution of them committed to the executors of the will, who are not named until the concluding clause of it. Indeed, it is not an unknown thing that the sole object of the making of a last will has been to appoint an executor, giving no testamentary disposition of the estate, but leaving the executor to dispose of it according to the statute of distribution; and such a will must be proved. (3 Redf. on Wills, 67.) So the clause of revocation of all former wills is sometimes of much import, and it is usually the final provision in a will. A will may become operative as a revocation of a former will, though inoperative in other respects. (*Laughton v. Atkins*, 1 Pick., 535.) Can we say that the end of the will has been found, until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name. It is to make a new law to say that where we find the name, there is the end of the will. The instrument offered is to be scanned, to learn where is the end of it as a completed whole; and at the end thus found, must the name of the testator be subscribed.

It is true that there are, and may be, cases in which all that a testator commits to writing in the same connection with his expression of testamentary purpose, will not be taken as part



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Opinion of the Court, per FOLGER, J.

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of his last will and testament. (*Tonnele v. Hall*, 4 Comst., 145; *Thompson v. Quimby*, 2 Bradf., 449.) But there must be evidence thereof in the form of the paper; in the wording and date of it; in the circumstances attending the execution, and preparation of the place for the signature of testator and witnesses; and in the fact that the portion of the written matter taken as a will to the exclusion of the other, is a sufficient will in form and substance. Such a case was *Conboy v. Jennings* (1 Sup. Ct. Rep., 622), which we refer to only as an illustration of a probable state of facts.

There are some cases cited by the respondent from courts to which an appeal lies to this court. They are of recent decision. The judgments in them may have been appealed from. We will not risk the appearance of a prejudgment by comment upon them.

I have examined all the cases cited by the respondent's counsel. They are, many of them, from other jurisdictions, and pass upon statutes quite different from ours, or which have had a laxer interpretation than has been given to ours by our predecessors.

The cases of *In re Woodley* (3 S. & T., 429 [1864]), *In re Walker*, *supra* (1862), and *In re Cassmore* (1 L. R. Pro. & Div. [1869]), cited by the learned justice at General Term, were decided after the act of parliament (15 and 16 Victoria, ch. 24, 1852-1853), which very much relaxed the rigor of the former act, which is said (in *Jackson v. Jackson*, *supra*,) to have been very like ours. (For a statement of the provisions of the act of 1852 and 1853, see *In re Heady's Will*, 15 Abb., Pr. Rep. [N. S.], 218.)

It is evident that the deceased considered the instrument to be one paper. We have no reason to say that he wished one part of it to be carried into effect if the whole was not. The statutory provision requiring the subscription of the name to be at the end, is a wholesome one, and was adopted to remedy real or threatened evils. It should not be frittered away by exceptions. While its provisions should not be carried beyond the policy of the framers of it, that policy should not be defeated by judicial construction. (*Hayes v. Hardin*, 6 Penn. St., 409.)

## Statement of case.

We are brought to the conclusion that the paper pro-  
pounded for probate, as a will, was not executed in compli-  
ance with the requirements of the statute of this State.

The judgment of the General Term should be reversed and  
the decree of the surrogate affirmed.

All concur.

Judgment accordingly.

MICHAEL MCGOVERN, Administrator, etc., Respondent, v.  
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD  
COMPANY, Appellant.

The rule requiring persons before crossing a railroad track to look to see  
whether trains are approaching is not applied inflexibly in all cases,  
without regard to age or other circumstances.

In an action to recover damages for the alleged negligent killing of W.,  
plaintiff's intestate, a lad eight years old, it appeared that he was going  
northerly on the west side of a street, running north and south, in the  
city of R., on his way to school; said street was crossed by three tracks  
of defendant's road. The view of the tracks was obstructed so that a  
person so passing could not see an engine or train approaching from the  
west, on the south track, until he was within four feet of the track.  
As W. approached the track a freight train, with an engine at each end,  
each ringing a bell, was passing west on the middle track. As the rear  
of the train was crossing the street, W. started to go diagonally across  
the tracks, in the direction of his school, when he was struck and  
killed by an engine which was backing down on the south track.  
Defendant had a flagman at the crossing on the east side of the street.  
Plaintiff's evidence tended to show that the flagman did not wave his  
flag or do any other act to warn W. of danger until at the moment of  
the accident; also that the engine was going at a speed of eight or ten  
miles an hour. Persons on the engine could not see the track to the  
east, on account of the coal in the tender. It was shown that a backing  
engine could not be so easily stopped as one moving forward, and that  
when so moving an arrangement for discharging sand on the track, in  
front of the wheels, to check the engine, could not be applied. The cross-  
ing was a dangerous one; the street was traversed by many people, and  
each morning school children were accustomed to pass at this point.  
*Held*, that the case was properly submitted to the jury; that it was for them  
to say whether, under the circumstances, it was prudent to move an engine

67	417
114	438
67	417
116	380
67	417
124	316

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backward at such a rate of speed without taking other and additional precautions to protect passengers on the street, and that the jury were justified in finding negligence on the part of the flagman; also that the omission of the boy to look to the west before stepping upon the track was not, under the circumstances, contributory negligence, as matter of law.

In an action brought by a father as administrator, under the statute (chap. 450, Laws of 1847; chap. 256, Laws of 1849), to recover damages for the death of his infant son, where the recovery is for his exclusive benefit, he may proceed for and recover his whole damages, including the loss of services of his son during minority. The recovery will be a bar to another action by the father, as such, assuming that he has a right of action independent of the statute.

(Argued November 22, 1876; decided December 5, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for the alleged negligent killing of William McGovern, plaintiff's intestate. The facts sufficiently appear in the opinion.

*Martin W. Cooke* for the appellant. The motion for a nonsuit should have been granted. (*Culhane v. N. Y. C. and H. R. R. Co.*, 60 N. Y., 133-137; *Reynolds v. N. Y. C. and H. R. R. Co.*, 58 id., 248; *Warner v. N. Y. C. and H. R. R. Co.*, 44 id., 466; 2 Redf. R. Cas., 501; *Burk v. Broadway, etc.*, 49 Barb., 529; S. & R. on Neg., § 50 and note; *Wilcox v. R., W. and O. R. R. Co.*, 39 N. Y., 358; *Griffin v. N. Y. C. and H. R. R. Co.*, 40 id., 34.)

*J. H. Martindale* for the respondent. The deceased was not guilty of contributory negligence. (*Reynolds' Case*, 58 N. Y., 252; *O'Mara's Case*, 51 id., 666; *Thurber's Case*, 60 id., 326; *Costello's Case*, 65 Barb., 101.) It was negligence for defendant to run its engine at the rate it was moving. (*Costello's Case*, 65 Barb., 101.)

ANDREWS, J. The defendant, on the trial, contested the right of the plaintiff to recover in both aspects of the case,

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Opinion of the Court, per ANDREWS, J.

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on the question of negligence. It was claimed that no negligence on the part of the defendant had been shown, and also that there was contributory negligence on the part of the deceased, or at least that it did not affirmatively appear that he was free from fault. A motion for a nonsuit was made on each of these grounds, which was denied. The refusal to nonsuit was proper, unless upon the evidence given it could be adjudged as matter of law that there was a defect in the plaintiff's case, in one or both of the particulars mentioned.

The main facts can be briefly stated. The accident, which resulted in the death of the plaintiff's intestate, was at the John street crossing, in the city of Rochester. The railroad runs east and west, crossing John street at grade by three tracks. On the south-west corner of John street and the railroad there is a house, with a porch extending to within four feet of the south track, and a person passing along the sidewalk, northerly, on the west side of the street, cannot see an engine or train approaching from the west until he has passed this obstruction. The defendant kept a flagman at the crossing to warn passengers when trains were approaching, whose usual position was south of the railroad track and on the east side of John street. The plaintiff's intestate, a lad eight years of age, left his home, south of the railroad, on the morning of the accident, to go to his school, north of the railroad and east of John street, and in company with other children passed northerly in his usual course, on the west side of the street, to near the railroad track. At this time a freight train, with an engine at both ends, each having a bell which was ringing, moved across John street, westerly, on the second track of the railroad. At the same time an engine was backing down from the west on the south track, also ringing a bell. Just before the freight train reached the crossing, the flagman, as the evidence on the part of plaintiff tended to show, stood at the flag-house without his flag, and being notified that a train was coming from the east took his flag from where it was hanging, and unfurled it, and the jury were authorized to find, though the

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Opinion of the Court, per ANDREWS, J.

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evidence on this point was conflicting, that he did not wave it or do any other act to warn the children of danger until at the very moment of the accident. When the rear of the freight train was crossing the highway the boy started to cross the track diagonally from the south-west corner of John street, in a snow path leading in the direction of his school, and, as he was passing across the south track, near the center of the highway, the backing engine struck him, and he was thrown down and shoved along the track for a distance of ninety-six feet, when the engine was stopped and the boy was taken up, and soon after died. The rear of the freight train was passing the center of the street as the backing engine reached it. There was much conflict in the evidence as to the speed at which the engine was moving. The engineer and other witnesses for the defendant put it at four or five miles an hour, and witnesses for the plaintiff at eight or ten miles. The persons on the backing engine could not see the track to the east, their view being obstructed by the coal in the tender, and the engineer first knew of the accident by a cry from persons on the track. It was shown that a backing engine could not be so easily stopped as one moving forward, and that an arrangement for discharging sand upon the track in front of the wheels could not be applied to check an engine when moving backwards. The flagman, according to his own testimony, did not discover the backing engine until it was within one hundred and seventy feet or thereabouts of the crossing, although it could have been seen by him for a distance of three hundred feet, and he did not see the deceased go from the sidewalk on to the track.

These facts, we think, raised a question for the jury on the whole case. It was for the jury to say whether, under the circumstances, the defendant exercised due care. The crossing was a dangerous one. It was across a public street in a populous city, traversed by large numbers of people, and each morning children were accustomed to cross the road at this point on their way to school. The view west was partially obstructed by the house and porch on John

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Opinion of the Court, per ANDREWS, J.

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street. The conjunction of circumstances at the time of this accident made it especially important that the company should exercise great care to protect foot passengers from injury. The noise of the advancing freight train was calculated to prevent hearing or distinguishing the noise or the signal from the backing engine. The credibility of the respective witnesses was for the jury, and if they believed that the engine was backing at the rate of eight or ten miles an hour, it was for them to say whether, under the circumstances, taking into view the nature of the crossing, the fact known to the company that children were accustomed to cross the track at that hour, the fact that the persons on the engine could not see the track behind them, and the greater difficulty in stopping a backing engine, it was prudent to move it at that rate of speed, at least without taking other and additional precautions to secure the safety of persons passing along the street.

In respect to contributory negligence on the part of the boy, it is claimed that the evidence shows that he did not look before stepping upon the track to the west, and that if he had done so he would have seen the engine, and the accident would not have happened. The rule which requires persons before crossing a railroad track to look to see whether trains are approaching, and that if they omit to do so, and are injured by a collision, which if they had looked would have been avoided, are to be deemed guilty of negligence, is not to be applied inflexibly, and in all cases, without regard to age or other circumstances. The law is not so unreasonable as to expect or require the same maturity of judgment, or the same degree of care or circumspection in a child of tender years as in an adult. (*Reynolds' Case*, 58 N. Y., 252.) The boy was on his way to school, and no negligence can be imputed to the parents in allowing him to go alone (*Drew v. The Sixth Avenue R. R. Co.*, 26 N. Y., 49) as he had done for nine months before the accident. The circumstances at the time and the appearances, were calculated to confuse and mislead him. He very naturally may have inferred

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Opinion of the Court, per ANDREWS, J.

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that the flagman was flagging the passing train and not the backing engine, and when the first danger was passed, he doubtless proceeded on his way unconscious of any other peril. The learned judge at the trial, in a very careful charge to the jury, submitted to them to determine on this point whether "he did all that could be required of a lad of his years for his own safety," and this, we think, was right, and that he could not have decided the question of negligence as one of law, conceding the fact to be, that the deceased did not look west before stepping on the track.

The other ground of nonsuit, that it was not affirmatively shown that the deceased was free from negligence in view of what has been said, need not be specially considered. The circumstances of the accident and the conduct of the deceased before the injury, were brought to the notice of the jury, and furnished a basis for a finding by the jury upon the question of the absence of negligence on his part.

The court in charging the jury, enumerated and commented upon the circumstances relied upon as showing the defendant's negligence, and said, among other things, that they might consider the fact that the engine was backing instead of going forward. "This," the judge said, "is of importance, in view of two items of testimony tending to show that an engine running in that direction, is less easy of control than one running straight forward," and then referred to the fact, that the persons on the engine could not see the track behind them; and also, to the circumstance "that the said pipes are so constructed that they will not discharge sand upon the track except when the engine is going forward." At the conclusion of the charge the defendant's counsel stated that he excepted to that part of the charge "by which the jury were permitted to consider the fact that the sand-pipes of the engine were so constructed as to be of no use in stopping a backing engine, as tending to establish negligence," and requested the court to charge, that such construction of the sand-pipes afforded no evidence of such negligence." The judge refused to charge on this

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Opinion of the Court, per ANDREWS, J.

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subject otherwise than as he had charged, and the defendant's counsel excepted.

It is obvious that the court did not intend to charge, that it was negligence on the part of the company to use engines in backing without an arrangement for discharging sand back of the wheels. The fact that in backing an engine the sand-boxes could not be used to retard the movement, was allowed to be considered as a circumstance bearing upon the question, whether the engine was running at an unsafe rate of speed. The jury could not have been misled and the exception was not well taken.

The defendant's counsel also requested the court to charge, "that if the flagman displayed his flag in due time to have warned the deceased, negligence cannot be imputed to the defendant, because the flagman did not do something more." The court refused to charge on the subject otherwise than as he had already charged.

It is not the duty of a railroad company to place a flagman at street-crossings; but it was said in *Kissenger v. New York and Harlem Railroad Company* (56 N. Y., 543), "that if one is employed at a particular crossing his neglect to perform the usual and ordinary functions of the post may be sufficient to charge the company." In this case it was the obvious duty of the flagman to warn the children as well of the backing engine as of the passing train. Indeed it was much more necessary for him to do the former, because the other danger was apparent.

The jury were, we think, authorized to find that he did not wave his flag or do any act indicating that there was danger except from the train, and from this to find a neglect on his part of the ordinary and proper duties of his position.

A question arises as to the rule of damages. The deceased was the son of the plaintiff, who brings this action under the statute, as administrator, to recover the pecuniary injuries to the next of kin, resulting from his death. (Chap. 450, Laws of 1847; chap. 256, Laws of 1849.) The defendant's counsel on the trial asked the court to charge the jury "that inas-



much as the father is entitled to the services of his son until he becomes of age, the earnings which he might have made during his minority are not to be considered." The court refused to charge as requested. Assuming, as seems to have been held in *Ford v. Monroe* (20 Wend., 210), that a father can recover damages for the loss of service of his minor son, against a person who negligently caused his death, to be computed and ascertained from the time of his death until the time when the son, if living, would have attained his majority, the question arises whether, in an action brought by the father, as administrator, under the statute, the entire damages may be recovered including the loss of service when as in this case the father elects to proceed for and claim his whole damages in the statutory action, and the recovery is for his exclusive benefit.

We are inclined to the opinion that in such a case damages for the loss of service may be included in the recovery as a part of the pecuniary loss to the next of kin of the deceased, resulting from his death, and that a recovery will bar another action for the same damages by the father as such. The point is certainly not free from difficulty, but this construction of the statute is, we think, permissible, and it is convenient, avoiding as it does the necessity which would otherwise exist of splitting up what is substantially a single claim, and bringing two actions for its recovery. We confine our opinion to the precise case presented, assuming, on the authority of *Ford v. Monroe*, that the father has a right of action, independent of the statute, for loss of service.

The judgment should be affirmed, with costs.

All concur, except CHURCH, Ch. J., and EARL, J., not voting; ALLEN, J., taking no part.

Judgment affirmed.

## Statement of case.

MARY E. DITCHETT, Administratrix, etc., Respondent, v. THE SPUYTEN DUYVIL AND PORT MORRIS RAILROAD COMPANY, Appellant.

67	426
120	578
120	582
67	426
120	123

A railroad corporation which has parted with the possession and control of its road under a lease thereof to another corporation, containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon a highway, for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession.

The provision of the general railroad act, as amended in 1854 (chap. 282, Laws of 1854), imposing upon corporations formed under it the duty of erecting and maintaining fences on the sides of their roads, does not apply to fences for the protection of travelers upon a highway.

As to whether the lessor of a railroad who has parted with possession can be held liable for the negligence of the lessee, under the statute in question, in a case where it does apply, *quære*.

*Ditchett v. Spuyten Duyvil and Port Morris Railroad Company* (5 Hun, 165) reversed.

(Argued November 23, 1876; decided December 5, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 5 Hun, 165.)

This action was brought to recover damages for the alleged negligence of defendant in allowing an excavation, made by it across a public highway, to remain unguarded and unprotected, thereby causing the death of Richard Ditchett, plaintiff's intestate.

Defendant, in constructing its road, made a deep cut or excavation across a highway in the town of Morrisania, Westchester county, known as Macomb avenue, and, by the direction of the board of trustees of the town, who were clothed with the authority of commissioners of highways, they erected a bridge on the line of another highway, a short distance from Macomb avenue. Defendant built a substantial fence along the line of the excavation, and across said avenue. In 1871, it leased its road, with the appurtenances, franchises,

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Opinion of the Court, per MILLER, J.

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etc., to the New York Central and Hudson River Railroad Company for ninety-nine years ; the lessee covenanting to see that the demised property was properly cared for and to surrender in good condition. The lessee took possession under the lease, and has, since that time, had possession and control, operating the road. A section of the fence across Macomb avenue had fallen down, and, as the evidence tended to show, the deceased on a dark night, going along the avenue, went through the opening and fell into the excavation and was killed.

Defendant's counsel requested the court to charge, among other things, that if the jury believed the omission to maintain the fence in question was on the part of defendant's lessee, defendant was not liable. The court refused so to charge, and defendant's counsel excepted. Further facts appear in the opinion.

*Frank Loomis* for the appellant. Defendant was not liable for the neglect of its lessee in suffering the fence to be down. (*Cheetham v. Hampson*, 4 T. R., 318 ; *Mayor, etc., v. Corliss*, 2 Sandf., 301 ; *Gwathney v. L. Miami R. R. Co.*, 12 Ohio St., 92 ; *Swords v. Edgar*, 59 N. Y., 28.)

*J. O. Dykman* for the respondent.

MILLER, J. The main question which arises upon this appeal relates to the liability of the defendant as the original owner of the railroad for the injury sustained by the intestate. The cut into which the intestate fell and was killed was made by the defendant, for the purposes of their railroad, and after it was completed substantial fences were erected along the line of the same. In this condition, while thus protected, the road was leased to the New York Central and Hudson River Railroad Company, and since then that corporation has been in possession of, and used and operated the road. Having the control of the railroad and its franchises at the time of the accident, it was the duty of its officers to keep up the fences

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Opinion of the Court, per MILLER, J.

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and to guard against accidents, and as lessees and occupants this corporation would be liable for any injury arising from their own negligence and carelessness. Had an action been brought against this company for an injury sustained by the neglect of its officers, it is difficult to see how it could escape liability, if a proper case had been made out.

The rule is well settled that an action for not repairing fences, by reason whereof another party is injured, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession. (*Cheetham v. Hampson*, 4 Term R., 318; *The Mayor, etc., v. Corlies*, 2 Sandf. S. C. R., 301; *Sands v. Edgar*, 59 N. Y., 28.)

In the case last cited, the doctrine is laid down that while the lessor of premises who leases them when they are already a nuisance, and receives rent, is liable for damages to a stranger happening therefrom, whether the owner be in possession or not, a lessor of premises not *per se* a nuisance, but which becomes so only by the manner in which they are used by the lessee, is not liable therefor. When the defendant parted with the control and possession of its railroad, the avenue through which the cut was made had been restored to its former condition so far as practicable, fully protected against danger from accident, and by the lease introduced in evidence from the defendant to the New York Central and Hudson River Railroad Company, the lessors were bound to see that the railroad demises, and every thing connected with it was properly cared for, and that the chasm which had been made, was sufficiently guarded. It was a part of the duty thus assumed, to keep up the fence where the accident happened, and in failing to exercise that due care and caution which the circumstances demanded, the lessee would be liable for negligence which caused an injury to another party.

The defendant had parted with the control and possession of the road and its appurtenances, and was not responsible within the rule laid down for any nuisance which did not exist prior to this period of time. Another party had taken the place of defendant, and that party alone was liable.

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Opinion of the Court, per MILLER, J.

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It is true that this defence was not interposed by the answer; but no objection was made upon the trial to the introduction of the lease or other evidence showing who was in the actual possession, and the facts connected therewith. As the evidence referred to bore upon the question arising as to the defendant's liability and negligence, and as the case was tried upon that theory, this defence is fairly presented and entitled to consideration upon this appeal.

The provisions of the general railroad act, which imposes upon corporations formed under the same, the duty of erecting and maintaining fences on the sides of their roads, of the required height and strength, was intended for the protection of passengers on trains, and cattle and other animals named therein, who might be in the adjacent field, and expressly enacts that no corporation shall be required to fence the sides of its road except when necessary to prevent cattle, etc., from getting on the track from lands adjoining the same. (S. Laws of 1854, chap. 282.) This clearly has no application to fences for the protection of persons who may be traveling, or to the fencing of an opening of the character of the one proved. Even if this provision should be held to apply in a proper case, it may well be doubted whether the lessor of a railroad who had parted with the possession could be held liable for the negligence of the lessee under the statute in question. As the defendant was not liable as the original owner, or for the alleged negligence of the lessee, the action cannot be maintained, and the court were in error in denying the motion to dismiss the complaint.

No other question requires comment, and the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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Statement of case.

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SIMON BACHE, Appellant, v. CHARLES DOSCHER, as Executor,  
etc., Respondent.

Where, in a foreclosure suit, persons holding prior mortgages are not made parties, and no provision is made as to them in the judgment, the sale must be subject to such mortgages, and no portion of the proceeds of the sale can be applied in payment thereof.

(Argued November 28, 1876; decided December 5, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of defendant, entered upon an order overruling exceptions to an order of Special Term dismissing plaintiff's complaint and directing judgment upon said order.

This action was brought to recover an alleged deficiency arising upon a foreclosure sale.

The complaint alleged in substance that plaintiff was assignee of a bond and mortgage executed by one William Goebel to Babet Blum; that after the execution of the mortgage Goebel conveyed the mortgaged premises to John Heiden, defendant's testator, by deed containing a clause stating that it was subject to said mortgage, which the grantee assumed and agreed to pay. That defendant foreclosed said mortgage, making defendant, as executor, a party defendant; that judgment of foreclosure was perfected, the premises sold, and upon such sale there arose a deficiency of \$731.55, which plaintiff asked to recover. The answer was a general denial.

Upon the trial, the judgment record was introduced in evidence by plaintiff. No demand or provision was made therein against defendant for any deficiency. The further facts pertinent to the questions involved, appear in the opinion.

*Lewis Wagner* for the appellant. Defendant was liable in the form of action adopted by plaintiff. (*Thorp v. Keokuk Coal Co.*, 48 N. Y., 256; *Burr v. Beers*, 24 id., 178; *Evans v. Jones*, 5 M. & W., 295; *Suydam v. Bartle*, 9 Paige, 294;

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Opinion of the Court, per EARL, J.

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*Williamson v. Champlin*, Clark's Ch. R., 10; 8 Paige, 70; *Comstock v. Drohan*, Gen. T. S. C., 1st dept., May, 1876; *Lane v. Salter*, 4 Robt., 239; *Burnside v. Matthews*, 54 N. Y., 82; *Osgood v. Toole*, 6 id., 479; *Gardner v. Clark*, 21 id., 401; *Chancey v. Lawrence*, 15 Abb., 109.) No new matter constituting a defence could be proved under the answer. (Code, § 149; *Beaty v. Swartrant*, 32 Barb., 294; *McKyring v. Bull*, 16 N. Y., 309; *Brazil v. Isham*, 12 id., 17.) The report of sale filed in the foreclosure was final. (*Bosworth v. Vandewalker*, 53 N. Y., 602.) Even if the referee erred in allowing the amount of the prior mortgage, defendant could not take advantage of it under his pleading. (*Braze v. Isham*, 12 N. Y., 17; *McKyring v. Bull*, 16 id., 297; *Gardner v. Clark*, 21 id., 401; *Morrell v. Irving F. Ins. Co.*, 33 id., 443.)

*Benj. M. Stilwell* for the respondent. The record in an action of foreclosure, in which notice that no personal claim is made against the party liable for the debt, is not evidence in another action of any fact tending to establish a personal liability as against the defendant so notified, as to him it is simply a judgment *in rem*. (*Foster v. Milliner*, 50 Barb., 395.) Where a party has appeared in an action, the referee's report of sale therein can only be confirmed and made evidence against him by showing notice to him under Rule 39 of the Supreme Court. (*Griffing v. Stote*, 5 How., 205.) The report of a referee is only evidence of the matters referred to him. (*People v. Bergen*, 53 N. Y., 404; Rule 73, Supreme Court.) After the commencement of an action to foreclose a mortgage, while it is pending and after a decree therein, no proceedings shall be had at law for the recovery of the debt unless authorized by the Supreme Court. (2 R. S., 199, § 153; Revisers' Notes [Edm. Stat.], vol. 5, p. 408.)

EARL, J. The plaintiff could, if he had so elected, have commenced an action upon the undertaking of the testator to pay the mortgage, and in the complaint in such action it

would have been unnecessary to have alleged any thing about the foreclosure proceedings. If the defendant had relied upon them as a defence it would have been necessary for him to allege them in his answer. But the plaintiff in this action has set out the foreclosure proceedings in his complaint, and seeks only to recover the deficiency, after applying upon the mortgage the amount realized from the sale of the mortgaged premises. The general denial in the answer puts in issue the amount of the deficiency. Upon the trial the plaintiff did not rest upon proof of the testator's undertaking in the deed given to him, but proved the foreclosure proceedings with the view of showing sale of the lands and the amount which yet remained due upon the mortgage. Hence the case was in such a condition that the defendant was entitled to dispute the amount of the deficiency.

It appears that judgment of foreclosure was entered, in which it was adjudged that the sum of \$2,508.94 was due upon the mortgage, and a referee was appointed to sell the mortgaged premises. He was directed to make the sale and execute a deed to the purchaser, and out of the moneys realized to retain his fees and expenses and the amount of any liens for taxes or assessments. He was then directed to pay the costs of the attorneys and the amount due upon the mortgage, and to deposit the surplus, if any, with the chamberlain of the city of New York. In pursuance of this judgment he advertised the mortgaged premises for sale, and the plaintiff became the purchaser for the sum of \$9,700, that being the highest sum bidden for the same. He reported that he disposed of this sum as follows: that he allowed the plaintiff \$1,191.95 for taxes and assessments, and \$6,091.25 for prior mortgages assumed by him; that he deducted his charges and expenses and paid the costs, and paid over to the plaintiff \$1,802.32, leaving a deficiency upon the mortgage of \$741.55. There was nothing in the complaint or judgment in that action about any prior mortgages, and no persons holding prior mortgages were made parties. Prior mortgagees were not necessary parties to the action, and the judgment and sale



## Statement of case.

did not and could not in any way affect their rights. All the referee could do was to sell the premises subject to such mortgages, if any; and all the title he could give was such as the parties to the action had. Such a sale he made. It does not even appear that he, in terms, sold the land free of the prior mortgages, or that it was one of the terms of the sale that the purchaser was to assume any prior mortgages. He reports that he made the sale for the sum above named, and then, in reporting the disposition of the proceeds, he asserts that he allowed the plaintiff to retain over \$6,000 for prior mortgages assumed by him. It does not appear who held the prior mortgages, nor how much was due upon them, nor even that there were any prior mortgages, or that plaintiff paid them. After allowing the plaintiff to retain upwards of \$6,000, he reports the small deficiency claimed in this action.

There was no adjudication, as against this defendant, that there was a deficiency, and the defendant is in no way estopped from denying that there was a deficiency. Assuming that the report is evidence of all the facts stated in it, it appears that there was no deficiency, and that the plaintiff had in his hands ample money to pay the mortgage and leave a surplus.

Upon such a state of facts, appearing by plaintiff's own proof, he was properly nonsuited, and the judgment must, therefore, be affirmed, with costs.

All concur; RAPALLO, J., not voting.

Judgment affirmed.

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MINNIE HAUCK, Respondent v. SAMUEL CRAIGHEAD et al,  
Executors, etc., Impleaded, etc., Appellants.

67	432
130	386
67	432
136	207

Plaintiff's complaint charged P. (originally a defendant), and defendant H. as joint contractors upon a contract executed by plaintiff and H. and signed by P. on the margin. The name of the latter did not appear in the contract. P. died after the commencement of the action and his executors

## Statement of case.

were substituted as defendants in his stead. *Held*, that the complaint was properly dismissed as to the executors of P.; that the action would necessarily have failed had P. lived, unless a joint obligation was established; that unless an action could have been brought against the surviving debtor and the personal representatives of the deceased, the latter were improperly substituted and joined as defendants with H., the survivor; that such an action could not have been maintained without an averment in the complaint of plaintiff's inability to procure satisfaction from the survivor; also that if P. was a mere surety for H., then by his death his estate was absolutely discharged from all liability. *Hauck v. Craighead* (8 Hun, 237) reversed.

(Argued November 23, 1876; decided December 5, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing a judgment in favor of defendants, Samuel Craighead and others, executors of Samuel N. Pike, entered upon an order dismissing the complaint as to them. (Reported below, 8 Hun, 237.)

The action was originally brought against said Samuel N. Pike and defendant Lafayette Harrison, in form against the latter upon a contract between him and plaintiff, and against the former as guarantor. Pike died after the commencement of the action, and his executors were substituted as defendants in his stead. The complaint was amended upon the trial so as to charge the original defendants as joint contractors.

The agreement upon which the action was founded is as follows:

"Memorandum of an agreement made this day, February 18, 1868, between Lafayette Harrison and Miss Minnie Hauck, as follows:

"Miss Minnie Hauck engages herself as prima donna assoluta, for operas and concerts, for the term of two months, from the 24th of February, 1868.

"Miss Minnie Hauck obliges herself to conform to all the rules and regulations of the theater.

"Mr. Harrison obliges himself to pay Miss Minnie Hauck the sum of fourteen hundred dollars per month.

"L. F. HARRISON.

## Statement of case.

"SAM'L N. PIKE."

"It is also understood and agreed that Miss Hauck shall sing at least three (3) times in each week, all extra performances to be paid at the rate of one hundred dollars (\$100) per performance.

"It is also agreed that the salary shall be paid in each and every week."

*A. C. Fransoli* for the appellants. Plaintiff failed to prove a contract of guaranty by the defendant's testator within the statute of frauds. (2 R. S., 135, § 2; *Abeel v. Radcliff*, 13 J. R., 297, 300; Revisers' Notes, 5 Stat. at Large, 394, § 8; *Davis v. Shields*, 26 Wend., 341, 350-361; *James v. Patten*, 6 N. Y., 1; *Coles v. Bowne*, 10 Paige, 526, 536; *Champlin v. Parish*, 11 id., 405, 410; *Vielis v. Osgood*, 8 Barb., 130, 132; *Davis v. Shields*, 26 Wend., 341, 356; *Dodge v. Lean*, 13 J. R., 508; *Bailey v. Ogdens*, 3 id., 399, 419; *Weed v. Clark*, 4 Sandf., 31; *Parkhurst v. Van Cortlandt*, 14 J. R., 15, 32; *Wright v. Weeks*, 25 N. Y., 153; 3 Bos., 372; *Parks v. Brinkerhoff*, 2 Hill, 663; *Clark v. Ransom*, 2 Den., 135; *Richards v. Warring*, 1 Keyes, 516; *Moore v. Cross*, 19 N. Y., 227; *Hill v. Lewis*, 1 Salk., 132; Story on Bills, §§ 108, 199, 202; Story on Promissory Notes, § 135; Byles on Bills [5th Am. ed.], \*142.) There was a misjoinder of causes of action in the complaint. (Code, § 120; *Brewster v. Silence*, 8 N. Y., 207; *Allen v. Fosgate*, 11 How. Pr., 218; *De Ridder v. Schermerhorn*, 10 Barb., 638; *Carman v. Plass*, 23 N. Y., 286.) The amendment allowed at the trial did not substantially change the statement of the cause of action as against defendants. (*Hauck v. Craighead*, 4 Hun, 561.) If the amendment changed the cause of action, it must be wholly disregarded, because the Circuit Court had no power to make it. (*Ford v. Ford*, 53 Barb., 525; *Moore v. McKibben*, 33 id., 246; *Union Bk. v. Mott*, 18 How., 506; *Sattus v. Genin*, 3 Bosw., 250, 263; *Hauck v. Craighead*, 4 Hun, 561, 562; *Sinclair v. Neill*, 1 id., 80; *Walter v. Bennett*, 16 N. Y., 250, 254; *Wright v. Delafield*, 25 id., 266, 270; *Everest v. Vandryes*, 19 id., 436, 439; Const., art. 6, § 7;

## Statement of case.

Code, § 9, sub. 34; id., §§ 17, 20, 21; *Mann v. Tyler*, 6 How., 235; *Onon. Co. Mut. Ins. Co. v. Minard*, 2 N. Y., 98; *Martin v. Hicks*, 6 Hun, 74; *Miller v. Porter*, 17 How., 526; Code, §§ 349, 350; *Brookman v. Hamill*, 43 N. Y., 554, affirming 54 Barb., 209.) After the death of Mr. Pike the cause of action survived against Harrison alone. (*Bentz v. Thurber*, 1 T. & C., 645; *Livermore v. Bushnell*, 5 Hun, 285; *Wilmur v. Curry*, 2 DeG. & S., 347; *Gere v. Clark*, 6 Hill, 350; *Pope v. Child*, 55 N. Y., 125; *Richter v. Popenhausen*, 42 id., 373; *Voorhis v. Childs*, 17 id., 354; *Getty v. Binsse*, 49 id., 385; *U. S. v. Price*, 9 How. [U. S.], 83; *Other v. Iveson*, 3 Drew., 177; *Jones v. Beach*, 2 De G., M. & G., 886.) A nonsuit granted at the trial will be sustained on appeal on any ground appearing in the case, without regard to the ground on which it was originally granted. (*Beekwith v. Whalen*, 5 Lans., 376 *Bakewell v. Elsworth*, 1 Legal Obs., 346.)

*Geo. V. N. Baldwin* for the respondent. The contract between plaintiff's agent and Pike arose out of some new consideration, and was not within the statute of frauds. (*Leonard v. Vredenberg*, 8 J. R., 23; *Rogers v. Kneeland*, 13 Wend., 114-122; *King v. Despard*, 5 id., 277; *Devlin v. Wood*, 34 Barb., 252; *Quintard v. De Wolf*, id., 97; *Chesterman v. McCostlin*, 6 N. Y. L. Obs., 212; *Farley v. Cleveland*, 4 Cow., 432-439; Chitty on Con., 752; Story on Con., § 1115; *Douglas v. Howard*, 24 Wend., 42; *Brown v. Curtiss*, 2 N. Y., 232.) The evidence showing that the contract was an original one was admissible. (*Park v. Brinkerhoff*, 2 Hill, 663.) The promise of Pike was an original promise; he was bound by it. (*Griswold v. Slocum*, 10 Barb., 402; *Richards v. Warring*, 1 Keyes, 576-584; *Parks v. Brinkerhoff*, 2 Hill, 663; *Clark v. Rawson*, 2 Den., 135.) A contract like the present, when reduced to writing, if only orally assented to between the parties, constitutes the agreement between them, although not signed by them. (*Dutch v. Mead*, 36 N. Y. Sup. Ct., 427.)

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Opinion of the Court, per ALLEN, J.

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ALLEN, J. The plaintiff has elected to charge the original defendant, Pike, as a joint contractor and debtor with Harrison, and unless they were joint obligors and thus joint debtors, the action would necessarily have failed had Pike continued to live. By his death the action abated as to him, and his personal representatives have been substituted as defendants jointly with the survivor, Harrison. Unless the action could have been brought against the surviving debtor, together with the personal representatives of the deceased debtor, the executors of Pike were improperly substituted and joined as defendants with Harrison, the survivor, and the action cannot be maintained. The question is the same as it would have been had Pike died before the commencement of the present action, and the plaintiff had sued the executors and Harrison jointly. Such an action could not have been maintained, unless the plaintiff had averred in her complaint her inability to procure satisfaction from the survivor. (*Vorhis v. Childs*, 17 N. Y., 354; *Richter v. Poppenhausen*, 42 id., 373; *Pope v. Cole*, 55 id., 125.) If, therefore, as is claimed by the plaintiff, Harrison and Pike were both original obligors and contractors, and therefore principal and joint debtors as between them and the plaintiff, the complaint was properly dismissed as to the executors of Pike, upon the ground of misjoinder. If Pike was a mere surety for Harrison, then by the death of the surety his estate was absolutely discharged from all liability upon the joint obligation, both at law and in equity, and no action could be maintained against his representatives, either severally or jointly with Harrison. (*Getty v. Binsse*, 49 N. Y., 385; *United States v. Price*, 9 How. [U. S.], 92; *Risley v. Brown*.\*) Whether, therefore, Pike, the testator, was a principal or surety in the contract of hiring, the complaint was properly dismissed as against his representatives. There are other serious difficulties in the way of the plaintiff's recovering in this action, but as the nonsuit must be sustained for the reason already suggested, they will not be considered.

\* Ante p. 160.

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Statement of case.

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The order granting a new trial must be reversed, and the judgment at Circuit affirmed.

All concur.

Order reversed, and judgment affirmed.

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MARGARET B. CRANE et al., Respondents, v. ROBERT L. TURNER,  
impleaded, etc., Appellant.

An assignee of a mortgage takes it subject to the equities attending its execution; he stands in the place of the mortgagee and can only enforce it in case it could be enforced by the latter if he had not assigned it.

P. and wife executed a mortgage upon premises of which the former had possession under a contract of sale, which mortgage was duly recorded. P. thereafter received a deed, which was recorded; the mortgage was assigned to plaintiff's testator. P. subsequently sold and conveyed the premises, receiving from the grantee a mortgage for a part of the purchase-money, which was duly recorded; the grantee had notice of the prior mortgage. P. assigned his mortgage to defendant T., assuring him that the mortgage was the first lien. T. searched the records back to the deed to P. In an action to foreclose the first mortgage, T. claimed that his mortgage was entitled to priority. *Held*, untenable; that as P. would be estopped from claiming a priority if he had retained the mortgage, his assignee had no superior right and was also estopped; and that the fact that the records showed a perfect chain of title sustaining T.'s mortgage gave it no precedence.

The only effect of recording an assignment of a mortgage is to protect the assignee against a subsequent sale by the mortgagee of the same mortgage.

(Argued November 24, 1876; decided December 5, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiffs, entered upon a decision of the court at Special Term. (Reported below, 7 Hun, 357.)

This was an action for the foreclosure of a mortgage executed by Ethan A. Pierce and wife to Aurora O. Pierce, and by her assigned to the plaintiff's testator.

The facts appear sufficiently in the opinion.

## Statement of case.

*M. M. Waters* for the appellant. The interest Ethan A. Pierce had March 21, 1865, which he mortgaged to Aurora O. Pierce, was not a mortgagable interest. (2 R. S., 135, § 6; 49 N. Y., 33; 31 id., 453; 9 J. R., 331; 6 id., 34, 39; 7 Barb., 74; 1 Wend., 418; 5 id., 30; 3 Barb. Ch., 407, 413; 47 Barb., 163.) A mortgage without covenants of title, like a quit-claim deed, operates only upon the title the mortgagee had when it was given. (23 N. Y., 532; 56 id., 108; 4 Barb., 180; 40 id., 488, 498; 4 Wend., 623; 1 Cow., 613; 14 J. R., 193; 1 R. S., 738.) The contract of sale with Ethan A. Pierce would not have been a conveyance if it had been in writing, and the record of it would not have been constructive notice. (Gerard's Titles to Real Estate, 474; 28 N. Y., 191; 61 Barb., 111.) A purchaser is not bound to take notice of the record of a deed from a person to whom there is no recorded conveyance. (Gerard's Titles to Real Estate, 593; *Cook v. Travis*, 20 N. Y., 402; *Losey v. Simpson*, 3 Stockton, 246; 22 Barb., 338; 4 Wend., 619, note; 8 Paige, 361; 17 N. Y., 469; 57 id., 97; 2 Bin., 40.) As no conveyance was shown, sustaining plaintiff's mortgage, defendant was not bound to search for it. (20 N. Y., 402; 17 id., 369; 57 id., 97; 3 Stock., 246; 4 Wend., 619, note; 8 Paige, 361; 22 Barb., 338; 2 Bin., 40; Gerard's Titles to Real Estate, 593.) A conveyance not duly recorded according to law, even when the actual title has passed, is not effectual as constructive notice. (57 N. Y., 102; 28 id., 191; 17 id., 469; 8 J. R., 137; 2 Bin., 40; 8 Paige, 361; *Frost v. Beekman*, 1 Johns. Ch., 288.) The recitals in the deed to Ethan A. Pierce were not notice to defendant that he had mortgaged his equitable interest under the contract of sale before the deed was given. (46 N. Y., 384, 392; 15 id., 354; 8 Cow., 260; 3 Wend., 208; Gerard's Titles to Real Estate, 592; 18 J. R., 7; 3 Hun, 571, 573; 32 N. Y., 278.) The notice Ethan A. Pierce had of the existence of plaintiff's mortgage did not affect defendant. (Gerard's Titles to Real Estate, 593; 8 Cow., 260; 6 Paige, 323; 3 Kern., 509; 3 Barb., 652; 22 Wend., 543; 46 Barb., 211; 15 N. Y., 359; 29 id., 220; 34 id., 247, 347; 35 id.,

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Opinion of the Court, per MILLER, J.

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65; 47 id., 143; 56 Barb., 593; *Picket v. Barron*, 29 id., 505.)

*William G. Choate* for the respondents. Plaintiff's mortgage was valid, and duly recorded. (*F., L. and T. Co. v. Maltby*, 8 Paige, 361; *Dusenbury v. Hurlbert*, 59 N. Y., 544; *Stoddart v. Hart*, 23 id., 560; *Jackson v. Littell*, 56 id., 112.) Defendant is not entitled to priority as a subsequent mortgagee in good faith, without notice of plaintiff's prior mortgage. (*F., L. and T. Co. v. Maltby*, 8 Paige, 361, 363.)

MILLER, J. This case involves a question as to the priority of mortgages, as liens upon the premises mortgaged.

The mortgage foreclosed in this action was executed by the mortgagors, Ethan M. Pierce and wife to Aurora M. Pierce, and by the mortgagee was assigned to the plaintiff's testator. The mortgage and the assignment were both duly recorded. At the time when the mortgage foreclosed was executed, the mortgagor, Ethan M. Pierce, had possession of the land under a contract of sale, and held only an equitable title. A deed was executed to him after the mortgage was given, and subsequently the owner and mortgagor conveyed the premises to J. Denison Pierce, and took back a mortgage from him, which was duly recorded. The grantee had notice of the existence of the prior mortgage, and the grantor assigned the last-mentioned mortgage to the defendant, Robert Turner, which assignment was also placed on record. Turner searched the records back to the date of the deed to Ethan M. Pierce, inquired of the latter and was informed that the mortgage assigned was the first lien. The defendant claims that the mortgage assigned to him was entitled to priority over the mortgage held by the plaintiffs. We think that this position is without foundation, and cannot be upheld, as is manifest by a reference to recent cases decided in this court. The principle is settled beyond peradventure, that an assignee of a mortgage must take it subject to the equities attending the original transaction. If the mortgagee himself cannot enforce



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Opinion of the Court, per MILLER, J.

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it, then the assignee has no greater rights. The true test is, to inquire what can the mortgagee do by way of enforcement of it against the property mortgaged, and what he can do the assignee can do and no more. As a purchaser of a chose in action he must always abide the case of the person from whom he buys, and he stands entirely in the place of the latter. (*The Trustees of Union College v. Wheeler*, 61 N. Y., 88; *Green v. Deal*, 64 id., 220.) In the case at bar the original mortgagee of the mortgage held by the defendant Turner, was the owner of the premises; had executed the first mortgage to the plaintiff's assignor, and had full knowledge in regard to the same. He was in no position then to enforce the second mortgage which was given to him by his grantee, as a lien prior to the first one held by the plaintiffs, and the doctrine of estoppel would apply to any such claim. He was fully acquainted with its existence, knew that it was a lien upon the farm prior to the one he had taken, and was thereby absolutely precluded from any right to assert a priority as to the second mortgage. Under the rule referred to, his assignee stands precisely in his position, and has no better or greater right to claim priority. The fact that the assignor had only an equitable title when the first mortgage was given, even if that title was not the subject of a mortgage, does not in any way change the aspect of the case or the rights of the parties. The assignor was estopped from denying the validity of the mortgage or the priority of the lien, and, of course, the assignee takes no better, and no superior right to a preference. Nor is there any ground for the position of the defendant's counsel that under the recording act the plaintiff's mortgage was not notice to the defendant, although recorded, because the record shows a perfect chain of title sustaining the plaintiff's mortgage. This point is also decided adversely to the defendant's claim, in *Green v. Deal* (*supra*), and it is there held that the only effect of recording an assignment of a mortgage is to protect the assignee against a subsequent sale of the same mortgage. If it be not put on record then the assignee might assign to another person, a *bona fide* purchaser

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Statement of case.

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for value, who might record his assignment first, and hold the mortgage against the first assignee. The case last cited involves the precise point last considered, and is decisive upon that question.

As the recording act does not aid the defendant, and no ground is shown upon which he is entitled to a priority, it necessarily follows that there was no error upon the trial, and the judgment of the General Term must be affirmed.

All concur.

Judgment affirmed.

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IN THE MATTER OF THE PETITION OF CLARA M. PEUGNET TO  
VACATE AN ASSESSMENT.

A certificate of the absence of fraud given in pursuance of, and by the commissioners appointed by the "act in relation to certain local improvements in the city of New York" (chap. 580, Laws of 1872), cures any irregularities and defects in the proceedings of the common council in passing the ordinances, and any omission to advertise the same, and validates an assessment for repaving a street in the city of New York, upon property for which an assessment has been paid for paving, where the work was done after the passage of said act and prior to the passage of the amendatory act of 1874 (chap. 818, Laws of 1874).

The provision of section 7 of said act of 1872, exempting from the effects of such certificate assessments for repaving, only saved the right to have an assessment vacated, for any irregularity or omission to advertise, to persons assessed for a repaving already completed at the time of the passage of the act, or then being done; the amendment of this section by the act of 1874 extending the benefits of this saving clause to those assessed "for work thereafter made, done or performed" took effect only from the time of its incorporation into the original section, and had no retroactive effect.

An ordinance authorizing the repaving of a street was passed April 29, 1871, an assessment for the work was confirmed January 30, 1874, before the passage of said amendatory act. In a petition presented on application to vacate the assessment it did not affirmatively appear, nor was there any thing shown from which it could be reasonably inferred, that the work was in progress on May 7, 1872, the date of the passage of the original act; the requisite certificate was given by the commissioners. *Held*, that an order vacating the assessment was error.

## Statement of case.

As to whether the exception in said section was not confined to cases where the contracts had not been passed upon by the commissioners and declared free of fraud, *quære*.

*In re Astor* (53 N. Y., 617) distinguished.

Where a record on appeal to this court shows no error the court has no power to grant a new trial or rehearing.

A rehearing upon a motion or summary application can only be granted on reversal of an order.

(Argued November 28, 1876; decided December 5, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department reversing an order of Special Term vacating an assessment upon two lots owned by the petitioner, for repaving Fortieth street, in the city of New York, from Third avenue to Madison avenue. (Reported below, 5 Hun, 434.)

The petition showed that a former assessment upon the lots for paving had been paid. The assessment in question was confirmed January 30, 1874. The ordinance authorizing the work was passed by the common council April 27, 1871. When the work was done did not appear in the petition, nor did it contain any statement in reference thereto.

The assessment was claimed to be void because the resolution authorizing the work was adopted without notice having been published as required. (§ 20, chap. 137, Laws of 1870.) It was admitted that the contract for the work was certified by the commissioners appointed by chapter 580, Laws of 1872. The contract was not produced, nor did its date appear.

Further facts appear in the opinion.

*Timothy F. Neville* for the appellant. The ordinance should have been published three days in a corporation newspaper. (Laws 1870, chap. 137, § 20; Laws 1870, chap. 382; Laws 1868, chap. 853, § 1; Laws 1857, chap. 446, § 7; *In re Smith*, 52 N. Y., 526.) These statutes being *in pari materia*, are to be taken together as if they were one law. (*Rogers v. Bradshaw*, 20 J. R., 735; *Rexford v. Knight*, 15 Barb., 627; *Smith's Com.*, §§ 639, 751; 1 Doug., 30; 1 Kent's Com.,

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Opinion of the Court, per ALLEN, J.

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463; *M. and W. Tpks. Co. v. People*, 9 Barb., 161.) No power has been conferred upon the corporation of the city of New York to make an assessment for repaving a street. *Sharp v. Spier*, 4 Hill, 76; Laws 1872, chap. 580, § 7; *In re Astor*, 53 N. Y., 617.)

*Hugh L. Cole* for the respondent.

ALLEN, J. The order appealed from should be affirmed, the irregularities and defects in the actions of the common council of the city in passing the ordinances authorizing the work and the omission to advertise such ordinance being cured by the certificate of the commissioners appointed by chapter 580 of the Laws of 1872. That the case is within the provisions of the act and the assessment validated by it, was adjudged by the Supreme Court, and we concur in that part of the opinion of Judge DANIELS in which he considers the effect of the statute upon the application. The same assessment was before us *In the Matter of Levy*,\* not reported; but the statute referred to and the action of the commissioners under it was not interposed as a defence to the application, either in the Supreme Court or in this court.

The order must be affirmed.

All concur.

Order affirmed.

Upon decision of a motion for re-argument, the following opinion was handed down:

ALLEN, J. The conflict between our decision in this case and that made *In re Astor* (53 N. Y., 617), is rather apparent than real. The decisions are easily reconciled when the facts of each are understood, and without disturbing the effect given in the reported case to section 7 of chapter 580 of the Laws of 1872. The statute of 1872 was passed May 7 of that year, and as interpreted in *Astor's case* (*supra*), saved the rights of all persons assessed for a repaving then already completed,

\* 68 N. Y., 637.

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Opinion of the Court, per ALLEN, J.

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or then being done, to relief, and to have the same vacated for any omission to advertise the ordinances providing for the work pursuant to law, or other irregularity, notwithstanding the certificate of the commissioners named in the act that the contract was free from fraud.

The ordinance under which the work had been done, and for which Mr. Astor's property had been assessed, was passed in 1870, and the assessment was vacated in February, 1872, and although it did not appear at what time the work was done, there was enough to authorize the inference that it had either been completed or was being done at the time of the passage of the act, so as to bring it within the precise terms of the saving clause of that act. It was not deemed probable, even if possible, that the work should have been commenced and completed and the assessments made and confirmed by due course of law, and the application to vacate the same made and determined between the 7th day of May, 1872, and the 13th of February, 1873, about nine months, when the city authorities had from February, 1870, to enter upon the performance of the work, and to perform the same. Improvements of this character, when once authorized, are not thus deferred for years and then hurried to completion in a few weeks.

The benefit of this saving clause of the act was not extended to those assessed "for work thereafter made, done or performed" until May 2, 1874, and then it was done by an amendment of section 7 of the statute of 1872 (*supra*). (Laws of 1874, chap., 313.) This amendment took effect from its incorporation into the original section, and had no retroactive operation. (*Ely v. Holton*, 15 N. Y., 595.) The word "hereafter," used in the statute as amended must be construed distributively. As to the cases within the statute as originally enacted, it means subsequent to the passage of the original act; as to cases brought within the statute by the amendment, it means subsequent to the time of the amendment. The work for which the lands of the present petitioner were assessed was authorized by ordinance passed April 27,

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Opinion of the Court, per ALLEN, J.

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1871. The assessment for the work was confirmed January 30, 1874, before the passage of the amendatory act, and there was nothing to show, or from which it could be reasonably inferred, that the work was in progress on May 7, 1872. It is possible that the contract for it had been let, and the contractor had entered upon its performance, but it does not affirmatively appear. At what time the contract was submitted to the commissioners, and they examined into the facts and circumstances relating to it, does not appear. By the statute, section 2, they were allowed ninety days from the passage of the act within which to perform their duties. In the Astor case there was no direct proof to bring the case within the statute, but the presumption was very strong, and the inference was almost irresistible from the dates and circumstances, that the work must have been in progress at the time of the passage of the act. Not so in this case. The just inference is the reverse, or at least the presumption is as strong that it had not been commenced as that it had been, and the petitioner should have made the proof. The construction and effect given to the act of 1872, in the case quoted, should not be applied to cases not clearly within the circumstances of that case. It could be very plausibly argued that the saving clause of the seventh section introduced for the benefit of those who were assessed for repaving streets, was confined to those cases in which the contracts had not been passed upon by the commission created by the act and declared free of fraud, and that the very explicit provisions of the first and succeeding sections, validating and confirming all ordinances and contracts for work, and imperatively requiring the comptroller to pay for the same and certify the amount, and directing the assessment of the amount so certified upon property benefited, did in fact make valid for all purposes, all ordinances, contracts and assessments within the terms of those sections, and that the seventh section would have full scope and effect in its applications to ordinances and contracts that had not been submitted to and passed the scrutiny of the commission.

But without further considering this question the motion

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Opinion of the Court, per *Curiam*.

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must be denied, for the reason that the petitioner has not shown that the work had been performed before, or was being performed at the time of the passage of the act of 1872.

All concur.

Motion denied.

On decision of motion to correct *remittitur* the following opinion was handed down :

*Per Curiam.* We cannot re-examine this case and correct the *remittitur* upon affidavits or other evidence outside the record making a case different from that brought up by the appeal. If the petitioner can by other evidence bring herself within the act of 1872, so as to entitle her to a vacatur of the assessment upon her property it can only be done by permission of the Supreme Court. We can reverse, affirm, or modify an order brought to this court by appeal, but if the record shows no error, we cannot grant a new trial or a rehearing. Rehearings upon motions and summary applications are only ordered upon a reversal of an order. The Supreme Court have power to grant any relief to which the petitioner is entitled, and upon such terms as may be just, and that court may either reopen the case or grant leave to renew the application, but such an application is addressed to the discretion of that court, and we can neither direct action of that tribunal in advance, or review its action upon such an application after the exercise of its discretion.

This application must be denied, without costs.

All concur.

Motion denied.

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Statement of case.

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CHARLES H. ROOSEVELT, Respondent, v. VICTOR LINKERT,  
Appellant.

Where a judgment is for the recovery of a sum of money, to give a right of appeal to this court, under the amendment of 1874, to section 11 of the Code (chap. 322, Laws of 1874), the judgment must, in all cases, exceed \$500.

(Argued December 5, 1876; decided December 17, 1876.)

67	447
108	519

THIS was a motion to dismiss an appeal.

The facts sufficiently appear in the opinion.

*Martin J. Keogh* for the appellant.

*Charles H. Roosevelt*, respondent, in person.

EARL, J. This action was commenced by the plaintiff to recover a balance of \$997.52, alleged to be due him for services, as an attorney, rendered for the defendant. Besides other defences, the defendant alleged, in his answer, certain counter-claims, amounting to \$1,322.32, and claimed judgment against the plaintiff for that amount, besides interest.

The action was tried before a referee, who found the value of plaintiff's services as attorney for defendant to be the sum of \$1,303.34, of which he had been paid the sum of \$320.50, leaving a balance of \$982.84 due; and he found the counter-claims of the defendant to amount to \$595.50, and the balance due plaintiff, after deducting the counter-claims, \$387.34. For the latter sum, with interest, amounting to \$412.29, he ordered judgment in favor of the plaintiff. Judgment having been entered for this sum, besides costs, the defendant appealed to the General Term of the Supreme Court, and from judgment of affirmance there, to this court. This motion is now made by the plaintiff to dismiss the appeal, under the act chapter 322 of the Laws of 1874, on the ground that the judgment, exclusive of costs, does not exceed \$500. That act provides that no appeal shall be taken to the Court of Appeals "where the amount of the judgment or subject-matter in



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Statement of case.

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controversy in the action or proceeding does not exceed \$500." If either the judgment or the subject-matter in controversy does not exceed \$500 there can be no appeal to this court. If the judgment be for the recovery of an amount of money, to give the right of appeal, it must, in all cases, exceed \$500. When the action is not one "affecting the title to real estate or an interest therein," and there is no judgment for money, then the subject-matter in controversy must exceed \$500. To ascertain the amount of the subject-matter in controversy, in such cases, the pleadings will not alone be looked to, but the whole case, to see what the real controversy is and the amount of it, except in the single case mentioned in the act, to wit, "in actions not founded upon contract, when the judgment appealed from is for the defendant the amount claimed in the complaint shall be deemed the amount of the subject-matter of the controversy." In *King v. Galvin* (62 N. Y., 238) the action was in tort and the judgment was for the defendant; the plaintiff appealed. The complaint, as framed, claimed more than \$500, but the amount claimed was, by stipulation, reduced below that sum, and this court held, on that account, that the case was not appealable.

The appeal must be dismissed, with costs of appeal to time of making the motion, and ten dollars costs of motion.

All concur.

Appeal dismissed.

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CYRUS A. BAKER, Appellant, v. HARRIET ARNOT et al.,  
Executors, etc., Respondents.

Where one holding securities in pledge for a loan, in pursuance of a sale thereof made by the owner, delivers the same to the purchaser, receives the purchase-price, and after deducting the amount of the loan pays over the residue to the owner, this is not an affirmation by the pledgee of the genuineness of the securities, and, in the absence of fraud, an action cannot be sustained against him by the purchaser to recover back the purchase-price in case the securities prove to be forgeries.

## Statement of case.

One R. agreed with the agent of defendants' testator A. for a loan for sixty days upon certain forged railroad bonds. The agreement was for a loan of eighty-five per cent on the face of the bonds for sixty days at one and one-half per cent per month, with seven per cent rebate in case the loan was taken up before, R. having the privilege of taking it up at any time. After the terms of the loan were settled, the agent proposed that to avoid trouble the bonds should be sold to A. direct, he giving a contract to sell them back in sixty days for the amount of the loan and the sum agreed to be paid therefor. This form of the transaction was accordingly adopted, the bonds delivered, the money advanced and the contract signed and delivered on behalf of A. R. subsequently contracted to sell the bonds to plaintiff; the bonds were delivered by A.'s agent, who received the purchase-money, deducted the amount due A. and paid over the residue to R. In an action to recover back the purchase-money, *held*, that whether the loan was usurious or not A. had no title to the bonds, save as pledgee, the title remaining in R., who had the right to sell them and to require A. to deliver at any time on being paid the loan; that the question of usury was one between R. and A., which in no manner affected the rights of plaintiff; that defendants were not estopped from setting up the real transaction, because the form of a sale was resorted to to evade the usury laws; and that they were not responsible for the genuineness of the bonds.

(Argued November 17, 1876; decided December 12, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department in favor of defendants, entered upon an order overruling plaintiff's exceptions, and directing judgment upon a verdict.

This action was brought to recover the purchase-price alleged to have been paid by plaintiff to John Arnot, defendant's testator, upon sale by him to plaintiff of what purported to be bonds of the New York and Erie Railroad Company, which proved to be forgeries.

The facts sufficiently appear in the opinion.

At the close of the evidence on the trial, the court directed a verdict for defendants, to which plaintiff's counsel duly excepted. A verdict was rendered accordingly.

Exceptions were ordered to be heard at first instance at General Term.

## Statement of case.

*A. P. Whitehead* for the appellant. The purchaser having paid the seller for bonds purporting to be genuine, but which were spurious, may recover from the vendor the amount paid therefor. (Story on Sales, § 148, notes 3-7; Benj. on Sales, 492; Kerr on Fraud and Mistake, 58; Add. on Con. [ed. of 1874], 234; Byles on Bills, 324; 2 Pars. on Notes and Bills, 600, and note; *Ketchum v. Bank of Commerce*, 19 N. Y., 499; *Whedon v. Olds*, 20 Wend., 174; *Westropp v. Solomon*,<sup>+</sup> 8 C. B., 345; *Martin v. McCormick*, 4 Seld., 331; *Markle v. Hatfield*, 2 J. R., 455; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Wilkinson v. Johnson, B. & C.*, 428; *Kelly v. Solari*, 9 M. & W., 54; *Jones v. Ryde*, 5 Taunt., 488; *Herrick v. Whitney*, 15 J. R., 240; *Gompertz v. Bartlett*, 2 E. & B., 849-854; *U. S. Bank v. Bank of Ga.*, 10 Wheat., 333; *Merriam v. Wolcott*, 3 Al., 258; *Cabot Bank v. Martin*, 4 Gray, 156; *Bank of Commerce v. Union Bank*, 3 N. Y., 232; *Gurney v. Wormersly*, 4 E. & C., 133.) The presumption is that Arnot was the owner of the bonds. (Story on Bail, §§ 296-323; Edwds. on Bail, 93; *Bowman v. Wood*, 15 Mass., 534; *Depuy v. Clark*, 12 Ind., 432; *Collins v. Martin*, 1 B. & P., 648; *Peacock v. Rhodes*, 2 Doug., 633; *Hartop v. Hoare*, 3 Atk., 50; *Miller v. Race*, 1 Burr., 452; *Andrenes v. Dietrick*, 14 Wend., 31; 8 Cow., 238; *Coddington v. Bay*, 20 J. R., 637. *Ketchum v. Bank of Commerce*, 19 N. Y., 499.) Arnot being the actual owner of the bonds at the time of the sale, the real seller of them and the real party who delivered them to plaintiff, the court should have directed judgment for plaintiff, or allowed the case to go to the jury on the question of who the seller was. (Story on Bail, §§ 296-323; Edwds. on Bail, 93; *Bowman v. Wood*, 15 Mass., 534; 12 Ind., 432; 1 B. & P., 648; 2 Doug., 633; 3 Atk., 50; 1 Burr., 452; 14 Wend., 31; 8 Cow., 238; 20 J. R., 637; 19 N. Y., 499.) If Arnot made the purchase to avoid usury, he became the owner of the bonds, and he cannot plead his own wrong in answer to the allegation that he owned them when they were sold and delivered to plaintiff. (*Montefiori v. Montefiori*, 1 Wm. Blk., 364; 2 B. & Ald., 368; 4 Bing., 639;

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Opinion of the Court, per RAPALLO, J.

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Broom's Legal Maxims [7th ed.], 737; *Pearce v. Brooks*, L. R., 1 Exch., 213, 218; *Cowan v. Melbourne*, L. R., 2 Exch., 230.) John Arnot, Jr., was authorized to make this transaction with Roberts and with plaintiff. (Story on Ag., 114, §§ 252-260; Dunlap's Paley on Ag., 156, note 1.) Defendants' testator ratified the acts of his agent by keeping the price paid for the bonds by plaintiff, and is estopped from denying that he was the seller. (Story on Ag., §§ 251, 254; Dunlap's Paley on Ag., 171.) The tender made of the bond was sufficient. (2 Pars. on Bills, 600, 601; Story on Ag., § 103, *a*, 247, 451.)

*Ira Shafer* for the respondents. Defendants' testator was not a *bona fide* purchaser of the bonds. (*Ramsdell v. Morgan*, 17 Wend., 574; *Kentgen v. Parks*, 2 Sandf., 60; *Felt v. Heye*, 23 How. Pr., 350; *Schroeppel v. Soule*, 2 Seld., 107; *Schroeppel v. Corning*, 5 Den., 236; *Cousland v. Davis*, 4 Bosw., 619; 2 R. S. [2d ed.], 290, § 20; *Bakewell v. Ellsworth*, 6 Hill, 484; *Wheeler v. McFarland*, 10 Wend., 318; *Dykes v. Allen*, 7 Hill, 497; *Wilson v. Little*, 2 N. Y., 443; *Wheeler v. Newbould*, 16 id., 392; *Lewis v. Graham*, 4 Abb. Pr., 106; *Garlick v. James*, 12 J. R., 146.) The sale by Roberts, and the receipt by the bank, of the amount borrowed did not make the bank liable as warrantor of the genuineness of the bonds. (*Morley v. Allenborough*, 3 Exch. Ch., 500; *Baker v. Arnot*, 5 N. Y. S. C. R., 215; *Ketchum v. Bank of Commerce*, 19 N. Y., 499.)

RAPALLO, J. The allegations upon which this action is based are, in substance, that John Arnot, the testator of the defendants, in July, 1873, sold and delivered to the plaintiff what purported to be twenty-one bonds of \$1,000 each, of the Buffalo, New York and Erie Railroad Company. That they were so sold and delivered by Arnot to the plaintiff, as and for genuine bonds, and the plaintiff believing them to be such, paid Arnot therefor the sum of \$19,320, but they were in fact forged, and, therefore, of no value; that on the dis-

covery of this fact the plaintiff tendered them back to Arnot and demanded the return of the purchase-money, which was refused, to the damage of the plaintiff, etc.

The defense was, that the bonds were received by Arnot from one Roberts, as security for a loan to him of the sum of \$17,500. That afterward Roberts sold the bonds to the plaintiff, and directed Arnot's agent, with whom they were deposited, to deliver them to the plaintiff in pursuance of such sale. That Arnot's agent thereupon went with Roberts to the office of the plaintiff, and delivered the bonds to him, and received the price, and after deducting the amount due on the loan, paid over to Roberts the residue of the purchase-money. That Arnot had no other title to the bonds than above stated, and did not make the sale to the plaintiff.

There can be no doubt of the sufficiency of this defence if established by the evidence. If Arnot was merely pledgee of the bonds he was bound to deliver them to whomsoever Roberts might direct, on receiving payment of the loan, and was entitled, upon such delivery, to receive the proceeds, or at least so much of them as might be necessary to pay the loan. The fact that the whole proceeds were paid to him and that he paid them over to Roberts, after deducting the amount due on the loan, can make no difference. If the bonds were delivered by direction of Roberts and in pursuance of a sale made by him, such a delivery did not constitute any affirmation by Arnot of title in himself, or of the genuineness of the bonds. Were authority needed for this proposition the case of *Ketchum v. Bank of Commerce* (19 N. Y., 499) would seem to support it. Of course, it is to be assumed that there was no fraud on the part of Arnot, and none is alleged.

The plaintiff called as a witness Roberts, who testified that he applied to Mr. Cole, of the firm of Elisha Cole & Co., who were agents of Arnot, for a loan upon the bonds. That on the next day Mr. Cole introduced him to John Arnot, Jr., also an agent of John Arnot, deceased, who then agreed to make the loan, and the transaction was completed. Roberts further testified, on plaintiff's examination, that the transac-

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Opinion of the Court, per RAPALLO, J.

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tion was, that he borrowed of Arnot \$17,500, for sixty days, on the bonds, agreeing to pay him \$350, making \$17,850, but that Arnot, after agreeing to make the loan, and upon the terms, said he would not like the trouble, in case witness did not take up the loan, of looking him up and bothering with it, and proposed that witness should sell the bonds to him direct, and he, Arnot, would give a contract to sell them back at any time within sixty days, and thereupon Arnot delivered to him a contract, in the following words: "I hereby agree to sell to P. B. Roberts twenty-one first mortgage bonds of the Buffalo, New York and Erie Railroad company, of one thousand dollars each, for the sum of seventeen thousand eight hundred and fifty dollars, sixty days from date." That Roberts thereupon delivered the bonds to Arnot, who advanced the \$17,500. That witness understood it to be a loan. This transaction occurred on the 1st day of July, 1873. On his cross-examination the witness further testified that it was also agreed at the time, that if he paid off the loan before the end of the sixty days Arnot was to allow him seven per cent.

Mr. Cole, another witness, called by the plaintiff, also testified to the effect that the transaction was a loan.

The plaintiff further gave in evidence a conversation with John Arnot, Jr., on the occasion of a demand made upon him for the money which plaintiff had paid for the bonds, in which conversation Arnot, Jr., said that he hadn't any thing to do with the bonds but had loaned some money on them, and on witness calling his attention to the fact that he had bought them he said, further, "well, that is true, perhaps, but that was done for the purpose of avoiding usury."

The foregoing is the substance of all the evidence given on the part of the plaintiff, with respect to the title of Arnot to the bonds. The defendants called Mr. Wood, of the firm of Elisha Cole & Co., who corroborated the statements of Roberts as to the agreement for the loan. They also called John Arnot, Jr., who testified that he agreed to lend Roberts eighty-five per cent on the bonds for sixty days, at one and a

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Opinion of the Court, per RAPALLO, J.

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half per cent. per month, with seven per cent rebate, in case he took up the loan before, Roberts having the privilege of taking it up at any time. That no price was fixed on the bonds with reference to purchasing, and that the reason he stated to Mr. Roberts for making the agreement in evidence, was, so that in case the loan was not paid off he might sell the bonds without giving notice; that it was a mere form resorted to, and there was no idea of purchasing. The evidence in the case showed that the bonds were, at the time, worth about ninety-two in the market.

Upon this uncontroverted state of facts we are of opinion that it is clearly established that Arnot had no title to the bonds, except as pledgee, and that the title remained in Roberts and he had the right to sell them, and to require Arnot to deliver them at any time, on being paid the amount of the loan, and that, had the loan remained unpaid after the sixty days, Roberts would still have had the right to redeem them, without regard to the question of usury.

But the plaintiff claims that the loan being usurious, and the form of a sale having been resorted to for the purpose of evading the usury law, the defendants are estopped from setting up the real transaction, for the purpose of showing that Arnot was not the absolute owner. We do not regard this proposition as sound. If it had been necessary to the defendants' case to establish the usury, for the purpose of showing a want of title in Arnot, there might be some force in the position of the plaintiff's counsel. But in this case it is immaterial to the defense whether the loan was usurious or not; the question was whether the transaction between Arnot and Roberts was a pledge or a sale. If Arnot would not have acquired a title to the bonds, had the loan been free from usury, he certainly acquired no stronger one from the fact of the loan being usurious.

Nor did that circumstance diminish his obligation to deliver the bonds to any person whom Roberts might designate. The usury was a matter between Arnot and Roberts, which in no manner affected the rights of the plaintiff.

It being established that Arnot had no title to the bonds, except as pledgee, the next question is whether the sale to the plaintiff was made by Arnot or by Roberts. The uncontroverted evidence shows that on the second of July, the day after the loan, Roberts requested Cole & Co., and Arnot, Jr., to sell the bonds, and they emphatically refused to do so, Arnot, Jr., saying that he was satisfied with the loan as it was, and did not wish to pay the rebate. Roberts then said he would sell them himself. He applied to Haskin & Braine, brokers, to make the sale, and they employed one Schuzer, informing him that the delivery would be made by Elisha Cole & Co. Schuzer negotiated the sale of the bonds to the plaintiff at ninety-two per cent, and informed him that they would be delivered by Cole & Co. The plaintiff drew his check for the whole purchase-price, \$19,320, to the order of his cashier, who indorsed it to Elisha Cole & Co. Roberts notified Cole & Co. that he had sold the bonds, and requested them to make the delivery to the plaintiff. Mr. Wood, of the firm of Elisha Cole & Co., thereupon took the bonds and went with them, in company with Roberts, to the office of the plaintiff, and there delivered them to him, receiving the check for \$19,320. The plaintiff, on that occasion, made some inquiry of Wood about the bonds and he referred him to Roberts. There are some slight discrepancies in the testimony as to what was then said, but they are not material. It is perfectly clear that Wood did not assume that he or Elisha Cole & Co. were the owners or sellers of the bonds. On the contrary, the plaintiff himself testifies that on this occasion, and while the bonds were being examined, he said to Mr. Wood, "I suppose, you know these bonds to be all right." He said, "I have no interest in them, but, Mr. Roberts here knows all about them." Then plaintiff said, as he turned away, "Of course I should hold you if there is any thing wrong about them." What, if any thing, Wood said in reply, does not appear.

After receiving the check for \$19,320 Wood delivered it to



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Statement of case

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Arnot, who gave his check to Roberts for \$1,671.07, being the surplus after paying the loan.

These facts show clearly that Arnot was not the seller of the bonds. He was not bound to intrust them to Roberts for delivery, but was entitled to retain control of them till his loan was paid. The delivery by him was not, therefore, inconsistent with his position as pledgee. The proceeds being all in one check Cole & Co. were justified in taking it, for the purpose of retaining out of it the amount due their principal. If the plaintiff desired to know on whose behalf the sale was made he could readily have done so by inquiry. Not having made the inquiry and nothing having been done to mislead him, he must abide by the facts actually existing, and upon these facts he could not hold Arnot responsible, as warrantor of the genuineness of the bonds.

The judge, at the trial, was, therefore, right in nonsuiting the plaintiff, and the judgment must be affirmed.

All concur.

Judgment affirmed.

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JOHN I. DAVENPORT, Appellant, v. THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

The office of chief supervisor of elections, created by the act of congress, passed February 28, 1871 (16 U. S. Stat. at Large, 437), is additional to that of Circuit Court commissioner and not incident or appurtenant thereto. It is therefore within the provisions of the New York charter of 1873 (§ 114, chap. 335, Laws of 1873), which declares that the acceptance of office under the federal government is a relinquishment of any office held under the city; and is not within the exception in said section in favor of commissioners.

Accordingly *held*, that plaintiff, by accepting the office of chief supervisor of election, vacated the office of counsel to the health department, then held by him, and was not entitled to the salary of the latter office after such acceptance.

(Argued November 27, 1876; decided December 12, 1876.)

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Opinion of the Court, per RAPALLO, J.

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APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of the defendant entered upon a verdict.

This action was brought by plaintiff to recover \$940.85, claimed to be due him for his salary as counsel to the health department of the city of New York, from April 30, 1873, to July 8, 1873. Plaintiff was appointed counsel to the health department, January 15, 1873, at a salary of \$5,000.

Upon the trial it was admitted that plaintiff, during the entire period named in the complaint, was chief supervisor of elections in and for the southern district, in the second circuit of the State of New York, appointed pursuant to the act of congress passed February 28, 1871. The court directed a verdict for the defendant, to which plaintiff's counsel duly excepted. A verdict was rendered accordingly.

*Robert H. Strahan* for the appellant.

*A. J. Requier* for the respondent.

RAPALLO, J. We are clearly of opinion that the office of chief supervisor of elections is additional to that of Circuit Court commissioner, and not incident or appurtenant to the latter office. It was created by act of congress passed February 28, 1871, which provides that the Circuit Court of the United States of each circuit shall appoint from among the Circuit Court commissioners of each district, one of them, who for the duties required of him under that act, shall be known as chief supervisor of elections of the district. Many if not all of these duties are entirely different from those appurtenant to the office of commissioner, although in certain cases the chief supervisor may act at the same time both in that capacity and as commissioner. Commissioners as such, are not authorized to perform the duties of chief supervisor, but only the one who may be appointed in each district. When acting as chief supervisor he does so by virtue of his appointment as such, and not by virtue of his office of commissioner, and he

## Statement of case.

receives specified fees as supervisor to which he would not be entitled as commissioner. The act declares what compensation shall be paid to each chief supervisor for his services "as such officer" in excess of all fees as commissioner. The provisions of the act respecting the duties and fees of the office show that it is one of trust and emolument. It is therefore within the provisions of the charter which declares that the acceptance of such an office under the government of the United States is a relinquishment of any office held under the city (Laws 1878, p. 519, § 114), and is not within the exception in that section in favor of commissioners. It is not necessary to add any thing further to the reasoning of the court at General Term, with which we concur.

The judgment should be affirmed.

All concur.

Judgment affirmed.

THE SECURITY BANK OF NEW YORK, Respondent, v. THE  
NATIONAL BANK OF THE REPUBLIC, Appellant.

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114 80

In an action by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the custom and common understanding of banks and merchants the words "certified" at the time of the certification, when used in the certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, is inadmissible.

The plaintiff in such an action is not estopped from alleging the forgery by the fact that its teller at the time the check was presented for certification upon doubts being expressed in regard to it by the person presenting it, stated that it was right in every particular. It is no part of a teller's duty to give an assurance as to the genuineness of a check, except in respect to the signature of the drawer; and beyond that the bank is not bound by his representations.

(Argued December 1, 1876; decided December 12, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiff entered upon a verdict.

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Statement of case.

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This action was brought to recover, as for money paid by mistake, the amount paid by plaintiff to defendant upon a check which had been altered and raised after issue.

The check was drawn upon plaintiff by H. J. Cipperly & Co., to the order of J. Cox, for twenty-four dollars and sixteen cents. The check was altered by erasing the amount, the date and the name of the payee. The amount was raised to \$4,222.75, and the name of Duff & Tienken entered as payees. The check thus altered was offered to Duff & Tienken, who were gold brokers, in payment for gold. One of said firm testified that he went with the check to plaintiff's bank, told the teller that he did not like the looks of the messenger who brought the check to them; that he was a total stranger, and that "he wanted the teller to be very particular before certifying the check; that he Duff had a doubt in his mind about it, and he wanted to be assured that the check was genuine in every particular." The teller examined it, certified it, and handed it back, saying, "you need not have the slightest doubt about that check, it is correct in every particular; the drawer is a director of this bank." The check was thereupon received by Duff & Tienken in payment for the gold.

On the trial defendant offered to "show, by the testimony of various persons engaged in the business of bankers and merchants and dealers with banks, that the word 'certified,' as used upon the check now in suit, at the time of the certification, was commonly understood to import an obligation on the part of the bank to pay the amount expressed upon the face of the check so certified, notwithstanding that it may have been forged in the body;" also that, "under such circumstances, it was the custom among banks, and merchants and dealers with banks in the city of New York, to so construe the word 'certified,' indorsed upon the check, as to import an obligation to pay the amount, as stated in the check, when it was certified, notwithstanding the body of the check was forged." This evidence was objected to and excluded, and defendant's counsel duly excepted.

1. The first part of the paper discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the success of any business or organization. The author provides a detailed overview of the various methods used to collect and analyze data, highlighting the strengths and weaknesses of each approach. The text is written in a clear, concise style, making it accessible to a wide range of readers.

2. The second part of the paper focuses on the application of these methods in a real-world context. The author describes how the data collected was used to identify trends and patterns, and how this information was then used to make informed decisions. The text is supported by several examples and case studies, which help to illustrate the practical value of the research. The overall tone of the paper is professional and scholarly, with a focus on providing valuable insights and recommendations.

3. The third part of the paper discusses the limitations of the study and suggests areas for future research. The author acknowledges that there are several factors that could have influenced the results of the study, and provides a detailed analysis of these factors. The text concludes with a series of recommendations for future research, which are based on the findings of the study. The paper is well-organized and easy to read, with a clear structure that guides the reader through the various sections. The author's use of clear, concise language and the inclusion of relevant examples and case studies make the paper a valuable resource for anyone interested in the topic.

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Opinion of the Court, per ANDREWS, J.

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*perley v. Stewart*, 50 Barb., 68; 2 Pars. on Con., 53; 2 Greenl. Ev., § 251.) It was not within the province of the teller to give assurances that the check was correct in every particular. (*Watson v. Bennett*, 12 Barb., 196, 200; *Barrit v. Austin*, 21 id., 241, 242; *U. S. v. City Bk. of Columbus*, 21 How. [U. S.], 356, 364, 365.)

ANDREWS, J. In the *Marine National Bank v. The National City Bank* (59 N. Y., 67), it was decided that a bank by certifying a check in the usual form simply affirms the genuineness of the signature of the drawer, and that he has funds sufficient to meet it, and engages that they will not be withdrawn to the prejudice of the holder of the check, but does not warrant the genuineness of the body of the check.

Accordingly it was held that the plaintiff's bank which had certified and afterwards paid to the defendant's bank a forged check, altered before certification by raising the amount and changing the date and name of the payee, could recover back the amount paid as for money paid by mistake. The case is decisive of the present one, unless the court erred in rejecting the proof offered, to show that at the time of the certification of the checks in question, the word *certified*, when used in the certification of checks, was by the custom and common understanding of banks and merchants construed to import an obligation on the part of the certifying bank to pay the amount stated in the check notwithstanding the body of the check was forged or unless the plaintiff was estopped from alleging the forgery, by the circumstance that the teller of the plaintiff, when the check was presented for certification, was informed by the payee who presented it, that he did not like the looks of the messenger who brought the check and had a doubt about it, and wanted to be assured that it was right "in every particular," and that the teller then examined the check, and certified it, assuring the payee at the time that he need not have the slightest doubt about it, and that it was correct in every particular. We are of opinion that the offer to show by bankers and merchants the meaning

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Opinion of the Court, per ANDREWS, J.

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of the word "certified," and that when used in transactions like this it is understood to import an absolute obligation by the certifying bank to pay the check, although the amount had been fraudulently raised, was properly rejected. The only duty assumed by a bank on receiving the money of a depositor is to take care of the fund, and pay it over according to his direction. It owes no duty to the drawer or holder of a check except the duty to make present payment of the check out of the funds of the drawer on presentation.

Checks in theory are presented for payment and not for acceptance but the practice of certifying checks has grown up, and of late years has been largely extended, and the same effect has been given to the act of certification as to an acceptance of a bill of exchange. The manifest object of a certification is to indicate the assent of the certifying bank to the request of the drawer of the check that the drawee will pay to the holder the sum mentioned and this is what an acceptor does by his acceptance of a bill. As long ago as the case of *Robson v. Bennett* (2 Taunt., 388), it was said by Lord MANSFIELD that the marking of a check by the drawee on presentation was similar to the accepting of a bill and, he adds, "he admits hereby assets and makes himself liable to pay."

In *Merchants' Bank v. State Bank* (10 Wall, 604), the court say that "by the law merchant of this country, the certificate of the bank that the check is good is equivalent to acceptance," and the same language, in substance, is used by this court in *The Marine Bank v. The National City Bank*. There are many points of resemblance between a check and a bill of exchange, and in our courts and the courts of England, checks are often spoken of as bills of exchange. (*Harker v. Anderson*, 21 Wend., 372; *Little v. The Phoenix Bank*, 2 Hill, 425; *Keene v. Beard*, 8 C. B. [N. S.], 372; 2 Pars. on Bills, 58.)

The nature and meaning of the contract, evidenced by the certification of a check, was clearly defined by law, when the plaintiff certified the check in question. By the law as thus declared, the plaintiff, upon the certification of the check, became liable for its payment with the obligation of an

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Opinion of the Court, per ANDREWS, J.

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acceptance of a bill; and this was the extent of the obligation into which he entered, according to the legal effect and interpretation of the contract. The offer to prove that the contract of certification by the understanding of the bankers and merchants, had a larger scope and meaning than it had by settled legal construction was inadmissible. (*Bargett v. Oriental Mutual Ins. Co.*, 3 Bos., 385; *Higgins v. Moore*, 34 N. Y., 417; *Lawrence v. Maxwell*, 53 id., 19; *Wheeler v. Newbould*, 16 id., 392.)

The indorsement made by the plaintiff's bank was simply and exclusively a certification of the check, and it is bound only to such obligations as that act implies. In *The Marine Bank v. The National City Bank*, this court found no difficulty in interpreting the contract arising from a certification of a check without the aid of extrinsic evidence. That an acceptor of a bill of exchange which, after acceptance, was forged by raising the amount and changing the name of the payee, may recover back the money paid by him on the acceptance, was decided in *The Bank of Commerce v. The Union Bank* (3 N. Y., 230), and as, by analogy, the same right exists in the certifying bank to recover back money paid upon a check, if it turns out that the filling in was forged, there is no ground for claiming that the plaintiff was estopped from showing the body of the check to be a forgery by the verbal assurance of the teller to the payee of the check, that it was correct in every particular. It was no part of the teller's duty to give an assurance as to the genuineness of the check, except in respect to the signature of the drawers. If he went beyond this his representation did not bind the bank. Moreover, if the reply made to the question put to him was intended as an affirmation of the genuineness of the body of the check, it was simply an expression of his opinion, and must have been so understood by the person who made the inquiry.

The judgment should be affirmed.

All concur.

Judgment affirmed.



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Statement of case.

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JOHN D. DUCKER et al. Trustees, etc., Respondents, v. JOHN H. RAPP, Administrator, etc., Appellant.

R., defendant's testator, guaranteed the payment of rent by lessees of plaintiffs' testator. By the terms of the lease the rent was to be paid in quarterly installments. Two installments falling due May and August, 1874, not having been paid, plaintiffs brought separate actions therefor against the lessees, perfected judgments upon inquests October 6, 1874, and immediately issued executions. Thereafter, on the same day, an order was obtained and served staying plaintiffs' proceedings on the judgments for the purposes of a motion to open the defaults. Upon the motion an order was made allowing defendants to defend, the judgments and executions, however, to stand as security. A stipulation was then entered into between plaintiffs' attorney and the lessees, that the executions should be countermanded and all proceedings on one of the judgments stayed until November 25, 1874, and on the other until January 10, 1875, when the lessees promised to pay the same, with all sheriff's fees, plaintiffs being authorized to collect rents from subtenants and apply in payment of the judgments. In an action upon the guaranty, *held*, that, assuming the judgments to be valid (and they must be so regarded after the stipulation by which any defence was waived), the stipulation operated to postpone the payment of the rents so as to prevent their collection in any form until the days specified; that the agreement to extend the time was for a good consideration; and that the surety was thereby discharged.

It was also provided in the stipulation that, in case legal proceedings were commenced to collect the rent due November 1, 1874, the time for defendants to answer should be extended until February 5, 1875. *Held*, that thereby plaintiffs put it out of their power to procure a judgment for over ninety days after the rent accrued; that the provision would have bound the surety in case he had paid the rent; that the intent was to postpone payment and that the surety was discharged from the payment of this installment.

Plaintiffs sued to recover the rent as executors; they should have claimed as trustees. *Held*, that the same persons being entitled to recover, although in a different capacity, the manner of commencing the actions did not impair the validity of the agreement.

It was objected that plaintiffs' attorneys had no authority to make the stipulation. It appeared that one of the plaintiffs was present and consented thereto. *Held*, that it was to be presumed that the attorneys were employed to collect the rents under the will of the testator, and their mistake in attempting to recover in the name of plaintiffs as executors instead of as trustees did not impair the acts within the scope of their

## Statement of case.

authority, and that the presence and assent of one of the plaintiffs rendered it unnecessary to consider the extent of their authority.

*It seems*, that the withdrawal of the executions did not of itself, under the circumstances, operate to discharge the surety *pro tanto*.

Also *held*, that the stipulation did not impair the obligation of the surety as to other installments than those specified.

(Argued November 24, 1876; decided December 12, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York in favor of plaintiffs, entered upon an order overruling defendant's exceptions and directing judgment upon a verdict.

This action was brought upon a guaranty executed by John H. Rapp, defendant's testator guaranteeing the payment, on the part of the lessees, of the rent reserved in a lease of certain premises in the city of New York.

The lease was executed by and between Melchoir Ducker, plaintiffs' testator as lessor, and Richard Doane and others, as lessees; it was for a term of five years, from May 1, 1870, at a yearly rent of \$6,000, payable in quarterly payments thereafter. Mr. Ducker died July 17, 1871, leaving a will. In and by said will the plaintiffs herein were appointed executors and executrix, and were made trustees of an express trust, among other things, to collect the rents of the premises in question. The lessees failed to pay the rent due under the lease for the quarters ending May 1, August 1 and November 1, 1874, and February 1, 1875. The lessor, Rapp, died in January, 1874, leaving a will, and defendant was appointed administrator, with the will annexed.

The plaintiffs herein brought separate suits, as executors, against the lessees to recover the installments of rent which fell due in May and August, 1874. Answers were put in and inquests were taken in both of the actions against the defendant, and judgments were perfected thereon on the same day and executions issued. Upon the same day an order to show cause why the defaults should not be vacated, and meanwhile staying plaintiffs' proceedings, was granted. This was served after the executions were issued. Upon hearing the motion,

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Statement of case.

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on October 9, 1874, leave was given to the defendant to come in and defend, the judgments and executions, however, to stand as security. On the 21st October, 1874, plaintiffs' attorneys and the lessees entered into a stipulation, John D. Ducker, one of the plaintiffs, being present and assenting. The stipulation was as follows :

"No. 1. \$1,705.57.

"JOHN D. DUCKER and others, Executors, etc., Plaintiffs, v.  
RICHARD DOANE, LUMAN B. WING and others, Defendants.

"No. 2. \$1,678.01.

"SAME v. SAME.

"It is hereby stipulated by and between the plaintiffs and the defendants, as copartners, and the defendant Wing, individually, and their respective attorneys, as follows :

"*First.* The executions in each of said actions are to be countermanded within one day after the date of this instrument.

"*Second.* All proceedings upon the first judgment herein, are to be stayed until the 25th of November, 1874, and upon the second judgment, until the 10th day of January, 1875.

"*Third.* In case legal proceedings are commenced to collect the rent claimed to be due and payable November 1, 1874, for the premises described in the complaint herein, the time for defendants to answer the complaint therein shall be extended until the 5th day of February, 1875.

"The foregoing stipulations, on the part of the plaintiffs, are conditioned upon the observance by defendants of the following stipulations on their part :

"*First.* The defendants will pay to plaintiffs, or their attorneys, on the 25th day of November, 1874, the judgment in the first above action, with interest, less the sum of forty-one dollars and sixteen cents (\$41.16), paid as per order, entered October 9, 1874.

"*Second.* The defendants will pay to plaintiffs or their attorneys, on the 10th day of January, 1875, the judgment in the second of said actions, with interest, less the sum of forty-one dollars and sixteen cents (\$41.16), paid as per same order.

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Statement of case.

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"*Third.* Defendant Wing hereby empowers plaintiffs or their attorneys, at their option, to collect from his tenants on said premises, any rent which may hereafter become payable, up to and including rents payable the 1st day of February, 1875, from said tenants, on account of said premises or any part thereof, the same to be applied, if collected as aforesaid, toward the payment of said judgments, in their order as above stated.

"*Fourth.* All sheriff's fees, if any already accrued, are to be paid by defendants.

"It is hereby stipulated and agreed that in case either party violates the above stipulations, or any of them upon their part, then the other party shall not be bound or prejudiced by the above stipulations made on their part, or shall be bound or prejudiced in any manner, and are to have the same rights as if this instrument had not been executed.

"In witness whereof we have hereunto set our hands this 21st day of October, 1874.

"DIXON, WHITLOCK & ANDERSON,

*"Plaintiffs' Attorneys."*

In accordance with said stipulation, proceedings in the suits were stayed and the executions countermanded, and plaintiff Ducker proceeded to collect the rents from the sub-tenants. The amounts so collected were deducted from the amount due under the lease, the recovery here being for the balance.

Upon the trial defendant's attorney requested the court to instruct the jury, among other things, that the stipulation operated to discharge defendant; that it had that effect at least as to the three installments of May, August and November, 1874. That the omission of plaintiffs to collect the judgments, and the countermand of the executions operated to discharge defendant for the two quarters' rent. The court refused the request and directed a verdict for plaintiffs for the amount unpaid, to which defendant's counsel duly excepted.

*Edward M. Shepard* for the appellant. The extension of time granted by the plaintiffs as to the rent for May and

## Statement of case.

August and as to the time to answer discharged the surety. (*Bangs v. Strong*, 7 Hill, 250; 4 N. Y., 315; *La Farge v. Herter*, 11 Barb., 163; *Merritt v. Seaman*, 6 N. Y., 168; *Sheldon v. Hay*, 11 How. Pr., 11; *Worden v. Worthington*, 2 Barb., 368.) The court will not inquire whether by such extension of time or change of the contract defendant has been damaged. (*Miller v. McCoun*, 7 Paige, 452; *Bangs v. Stevens*, 7 Hill, 250; *Rathbun v. Warren*, 10 J. R., 587; *Hoffman v. Hurlbert*, 23 Wend., 377.) A surety is held merely to the letter of his undertaking. (Burge on Suretyship, 10; *Grant v. Smith*, 46 N. Y., 93.) The release by plaintiffs of the lien of their executions upon the personal property of defendant Wing discharged the surety to the extent of the value of this lien. (*Hayes v. Ward*, 4 J. Ch., 129; *Mimcervics v. Gahn*, 3 Paige, 614, 649; *La Farge v. Herter*, 4 Barb., 346; 11 id., 159, 166; *Baker v. Briggs*, 8 Pick., 122; *Comm. v. Hass*, 16 S. & R., 252; *Smith v. Orser*, 45 N. Y., 132; *Roth v. Wells*, 29 id., 471; 2 R. S., 365, §§ 13, 17.)

*Joseph M. Dixon* for the respondents. The agreement by the plaintiffs in the actions against the lessees being made without authority, did not affect the rights of the plaintiffs in this action. (1 Pars. on Con. [6th ed., m. p.], 121; *Parsons v. Lyman*, 5 Blatch., 170; *Wood v. Brown*, 34 N. Y., 337; *Quackenbos v. Southwick*, 41 id., 17.) There was no valid consideration for the agreement. (*Reynolds v. Ward*, 5 Wend., 501; *Keeler v. Bartine*, 12 id., 110; *Tryon v. Jennings*, 22 How., 421.) A creditor is not obliged to sue a principal until requested to do so by the surety. (*Singer v. Troutman*, 49 Barb., 182; *Remsen v. Beekman*, 25 N. Y., 552; *Clarck v. Sickler*, N. Y. Weekly Digest, April 7, 1876.) Mere delay or indulgence does not release the surety. (*Dorlon v. Christie*, 39 Barb., 610; *Thompson v. Hall*, 45 id., 214; *Reynolds v. Ward*, 5 Wend., 501; *Bk. of Utica v. Ives*, 17 id., 501; 2 Story on Con., § 874; *McKecknie v. Ward*, 58 N. Y., 541.) The surety's liability became fixed immediately on the lessee's default. (*McKenzie v. Farewell*, 4 Bosw., 192;

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Opinion of the Court, per CHURCH, Ch. J.

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*Turnure v. Hohenthal*, 36 N. Y. Supr. C. R., 79; *McKecknie v. Ward*, 58 N. Y., 541.)

CHURCH, Ch. J. This action is brought upon a guaranty by defendant's intestate to secure the payment of rent by lessees of plaintiffs' testator for certain premises in New York city. The amount claimed is for the rent due in May, August and November, 1874, and February, 1875.

The defense relied upon is, that the surety was discharged by certain transactions between the plaintiffs and the principal debtors. It seems that, for the rent due in May and August, actions had been commenced by the plaintiffs, as executors of the testator, and issues had been joined, and judgments were entered October 6, 1874, upon inquests at the Circuit. The same day an order was obtained staying plaintiffs' proceedings upon these judgments until a motion could be made to open the defaults, but before the order was served executions had been delivered to the sheriff. Upon the hearing of the motion, an order was made allowing defendants to defend the actions, but permitting the judgments and executions to stand as security. A stipulation was then entered into between the plaintiffs' attorneys and the principal debtors (the defendants in said judgments), the terms of which, it is claimed, discharged the surety. The stipulation provided: First. That the executions should, within one day, be countermanded. Second. That all proceedings upon one of the judgments be stayed until the 25th day of November, 1874, and upon the second judgment, until the 10th day of January, 1875. Third. That, in case legal proceedings were commenced to collect the rent due November 1, 1874, the time for the defendants to answer the complaint should be extended until the 5th day of February, 1875. The defendants agreed to pay the judgments on the 25th of November, 1874, and 10th of January, 1875, respectively, and to pay all sheriff's fees accrued; and the plaintiffs were authorized to collect rents from sub-tenants and apply the same in payment of the judgments.

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Opinion of the Court, per CHURCH, Ch. J.

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Several questions are presented: First. Assuming that, by the terms of the stipulation, the time of payment is extended, is the agreement supported by a sufficient consideration? The stipulation gave the plaintiffs a benefit or advantage in authorizing them to collect of the sub-tenants and apply the amounts upon the judgments. This was in the nature of additional security. It gave the plaintiffs the benefit of the personal responsibility of the sub-tenants, to the extent of their liability to the principal debtors, which the evidence tends to show was between \$4,000 and \$5,000 a year. The payment of the sheriff's fees upon the countermand of the executions, and the waiver of the right to defend, were also items of consideration; nor do I think that the manner of commencing the action impaired the validity of this agreement. The plaintiffs in the actions described themselves as executors, and claimed to recover the rents as such, while they should have claimed to recover as trustees and widow. The same persons were entitled to recover, although in a different capacity from that claimed; and any agreement by these persons, in respect to the rent or the judgments obtained therefor, was binding and valid. These persons, and no others, had power to act. They were both executors and trustees by the same will, and the mistake in professing to act in one or the other of these capacities appears to me to be a formal rather than a substantial matter, so far as the question of the validity of this agreement is concerned. The agreement, in either form, would inure to the benefit of the proper *cestuis que trust*, and if the rents were received by the plaintiffs as executors, they would be obliged to apply it as trustees. The defendant waived all objection to the judgments on that ground, and it is very clear that the payment of these judgments would have discharged all claim by the plaintiffs, as trustees or otherwise, for the rents.

The objection that the attorneys of the plaintiffs in the judgments had no authority to make this stipulation is answered by the fact that one of the plaintiffs was present when it was made, and assented to it, and this one had the

principal management of the business. It is presumable, also, that these attorneys were attorneys for the plaintiffs for the collection of these rents, under the will of the testator, in any capacity which the law would justify, and their mistake, in attempting to recover in the name of the plaintiffs, as executors instead of trustees, should not impair their acts within the scope of their authority; and the fact alluded to, of the presence of one of the plaintiffs, renders it unnecessary to consider the extent of their authority as attorneys in the actions. It follows that the agreement was valid.

The important, and somewhat difficult, question is to determine the true construction of this contract. If it operated to postpone the payment of the rents, so as to prevent their collection in any form, until the specified days, then the surety was precluded, if he had paid them, from prosecuting the principal debtors before that period, and, upon familiar principles, was discharged. An ordinary stipulation during a litigation to extend the time to answer would not affect a surety, nor would any agreement for indulgence to pay, or otherwise, unless it was founded upon a good consideration, and operated to prevent the collection of the demand in any form. Assuming that these judgments were valid, and they must be so regarded after the stipulation by which any defence was waived, and assuming that, so far as the question involved in this action is concerned, they must be regarded in the same manner as if the plaintiffs had prosecuted, formally, as trustees instead of as executors, as we must, from the above views, regard them, could the plaintiffs have discontinued these actions and commenced other actions for the recovery of these rents before the expiration of the times specified? It seems to me not. The evident intent of the parties was to postpone the payment of the May and August rent for which these judgments had been recovered. True, the language is that all proceedings be stayed upon the judgments, but, looking at the substance of the transaction, it is evident that the parties intended to agree to postpone payment until the times specified. If the plaintiffs had commenced another action for



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these rents as trustees, the former judgments and stipulation would have been a good defence, and the plaintiffs would not have been permitted to allege that they sued in the wrong capacity. As long as the defendants in the judgments could not complain, and those for whom the plaintiffs acted could not be injured or prejudiced, no court would permit parties, upon a mere technical formality, to violate an agreement to the injury of other parties. It is too late, strictly speaking, for a plaintiff to *discontinue* an action after judgment. He may satisfy it, but not to retain an enforceable interest in the cause of action, without leave of the court. The defendant had an interest and right, for which he had paid a valuable consideration, which was directly in conflict with the right of the plaintiffs to otherwise prosecute for these rents. The defendant had paid value for indulgence, and he was legally entitled to it. The two installments for rent were merged in the judgments, and the agreement to stay proceedings was like a valid agreement not to sue, which operates as a release of the surety. (Theobald on Prin. and Surety, 112.) If the plaintiffs could not have sued during the period of suspension, according to the terms of this stipulation, the surety could not, by paying, have sued his principal. The surety, upon payment, is subrogated to the rights of the creditor, but only to his rights; and if the creditor has bound himself by any transaction with the principal debtor, which prevents the surety, upon payment, from immediately prosecuting the principal debtor, the former is discharged. Any valid and binding agreement whereby the surety may be deprived of or delayed in the assertion of his equitable claim to pay the debt, and become subrogated to the rights and remedies of the creditor, if made without the assent of the surety, will discharge him. (10 Paige, 11.) When time is given to the principal debtor, though but for a single day, the surety is discharged. The surety, when he pays the debt, must have an immediate right of action against the principal, and that right cannot be postponed for any period, however short, by the creditor without discharging the surety. (1 Hill, 250.)

By applying these principles to the transaction, we feel constrained to hold that the surety was discharged from the payment of the May and August installments which were included in the judgments. The stipulation in respect to the rent due November 1, 1874, is peculiar; it is, that in case legal proceedings are commenced to collect the rent, the time for defendants to answer shall be extended to February 5, 1875. The plaintiffs, by this provision, put it out of their power to procure a judgment for the November rent for over ninety days, and I am unable to see, within the principles alluded to, why the surety, if he paid the rent and attempted to prosecute, would not be bound by it. He would, as we have seen, be subrogated to the rights of the plaintiffs in prosecuting the principal debtor. He would be entitled to all their rights and remedies, but nothing more, and he would be subject to all their disabilities arising out of any binding contract. If the plaintiffs were bound to give the delay, the surety would be, and, as the arrangement might have been injurious to the surety, it discharged him.

That this extension of the time to answer was not for any legitimate purpose of putting in a defence is patent. Actions had before been commenced and answers put in, and there is no intimation or probability, in fact, that any other or different answer was contemplated. It is unusual to agree in advance to give a party time to answer, and then the length of time (over three months) is significant of an intention to postpone payment. It may be that the surety has not been injured by this transaction, but it is such an interference with and change of the contract, for the performance of which the surety became bound, that the law implies injury. In the language of Lord ELDON: "I cannot try the cause by inquiring what mischief it might have done, for that would go into a vast variety of speculation upon which no sound principle could be built." (2 Ves., Jr., 542.) Another reason is, that the surety agreed to become bound for the performance of a particular contract, and not for another or different one. In this case he agreed that the lessees should pay the rent on the

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1st November, 1874, and not on the 5th February, 1875; and there is no power to hold him to an agreement which he never made.

The withdrawal of the execution is claimed to be a release of the security which, *pro tanto*, operated to discharge the surety.

This question is comparatively unimportant in view of the points before decided, but the security which the execution furnished is too unsubstantial to affect the obligation of the surety. At the time of the stipulation the principal debtor had a right to defend the actions, and the plaintiffs could not have succeeded in a contest without an amendment of the summons and complaint in each action. Whether this would have justified an amendment of the executions, and if so, whether the constructive lien would have dated from the original delivery, or from the time of amendment, are questions of too much doubt and uncertainty to render it proper to give any substantial value to the executions as securities, the withdrawal of which would be injurious to the surety.

The rent due 1st February, 1875, included in this action, is not affected by the stipulation. Each installment of rent was a separate and independent demand, and an extension of the time of payment of one would not impair the obligation of the surety as to the others. The judgment must be reversed and a new trial granted, costs to abide the event, except that neither party is to recover costs as against the other in this court, if the plaintiffs succeed in recovering sufficient to carry costs.

If the plaintiffs stipulate to reduce the judgment by deducting the May, August and November rent, then the judgment is affirmed for the balance, without costs to either party as against the other in this court.

All concur.

Judgment accordingly.

THE PEOPLE ex rel. AUGUSTUS MILLER, Appellants, v. THE  
BOARD OF POLICE COMMISSIONERS OF THE CITY OF NEW  
YORK, Respondent.

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Under the provision of the New York charter of 1873 (§ 41, chap. 835, Laws of 1873), prescribing the manner in which members of the police force may be removed, a public examination and inquiry into the truth of charges made against a member is requisite to his removal.

Charges were preferred against the relator, a member of the police force.

He was dismissed by the board of police commissioners upon a written admission of the truth of the charges, and a consent to waive trial not made to, or in presence of, the board. The accused presented to the board before the day assigned for a hearing a statement under oath, in which he recanted and withdrew the admission, and revoked the waiver of trial. He also fully answered the charges and explained the circumstances under which he made the admission. His answer was corroborated by the affidavits of others. He did not appear at the time designated for the hearing. No proof was made of the genuineness of his signature to the admission except that furnished by the statement. *Held*, that relator was illegally dismissed; that he was not estopped by the admission, the same not having been made as his answer to the charge to the tribunal having jurisdiction; that his consent to waive trial was revocable; and that the admission was not properly before the board.

*People ex rel. Miller v. Board of Police Commissioners* (6 Hun, 229) reversed.

(Argued November 24, 1876; decided December 5, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming the judgment and proceedings of the board of police commissioners of the city of New York dismissing the relator from the police force of said city, which proceedings were brought up for review upon *certiorari*. (Mem. of decision below, 6 Hun, 229.)

A formal charge for neglect of duty with specifications was presented, and a copy of the same, with notice of time and place of hearing, were served upon relator. Upon the notice was indorsed the following: "I hereby admit the within charge as specified and waive trial thereon," with what purported to be the relator's signature attached. Two days before the time of hearing specified in the notice, a statement made by

the relator, accompanied by the affidavits of four other persons, was presented to the board. The substance thereof and the subsequent action of the board are stated sufficiently in the opinion.

*Louis J. Grant* for the appellants. There was no competent proof on which the relator could be legally dismissed. (*Mullins v. People*, 24 N. Y., 399; *People v. Overseers of Ontario*, 15 Barb., 286, 293; 1 Greenl. Ev., §§ 328-368; 1 Phil. Ev., chap. 3; *People v. Smith*, 45 N. Y., 777.)

*Charles F. MacLean* for the respondent. The board of police duly acquired jurisdiction of the case of the relator. (Laws 1873, chap. 335, §§ 41, 55; *People ex rel. Clapp v. Department of Police*, 5 Hun, 457; *People ex rel. Cook v. Board of Police*, 39 N. Y., 506.) The board of police is alone competent to determine upon the seriousness of the charge to decide what was a neglect of duty. (*Dynes v. Hooper*, 20 How., 65.)

ALLEN, J. The relator, as a member of the police force of the city of New York, could only be removed by the board of commissioners after written charges had been preferred against him, and after the charges had been publicly examined into upon reasonable notice to him, and in such manner as the rules and regulations of the board of police might prescribe. (Laws of 1873, chap. 335, § 41.) Whether the board had prescribed any general rules for the government of the force or for the examination of charges against members of the force, or if so, what were the rules and regulations, does not appear. The relator was entitled to a compliance with the statute and to hold office until, after a public examination of charges made, he had been found guilty of some offence which should be deemed sufficient to warrant his removal. Charges were preferred and notice given of a time and place of hearing, as required by the statute; but there was no examination of the charges and no inquiry into their truth by

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Opinion of the Court, per ALLEN, J.

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the board of police commissioners, either publicly or in private. He was dismissed upon a written admission of the truth of the charges and a consent to waive a trial, not made to, or in presence of, the board, and without proof of the genuineness of the signature, except as by the statement under oath of the accused, in which he recanted and withdrew the admission, revoked the waiver of a trial, denied and fully answered the charges, and fully explained the reason why and the circumstances under which the admission was made. The admission was not before the board with the assent or by the authority of the relator, and the second statement was an answer to the charge, and called for an examination as if the admission had never been signed. The accused was not estopped by this admission, which was not made to the tribunal having jurisdiction, as his answer to the charges, and his consent to waive a trial were revocable. The board do not profess to have acted upon the waiver, but claimed to have examined into the truth of the charges and held them proved by the admission. When the board of police convened on the day assigned for the hearing, they had before them the withdrawal of the consent to waive the examination and a demand of trial, and the verified answer of the accused, corroborated by the affidavit of every other person present on the occasion except the complainant. The accused did not appear in person or by counsel, and the board were therefore authorized to proceed and publicly examine into the charges and inquire into their truth in his absence and *ex parte*. Instead of doing this they ignored the documentary evidence before them and the revocation of the consent to waive the examination and the sworn denial of the accused, and adjudged him guilty upon a paper not legitimately before them, taking it as the answer to the charge, notwithstanding the protestation of the accused that it was not his answer and was untrue. There was no trial or examination, and the dismissal was illegal. Judge LAWRENCE has covered the case in his dissenting opinion, which obviates the necessity of any further discussion of the question. It is as important to the discipline of the force

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that the trials of members upon charges should be strictly legal, as that the authority of the board, when properly exercised, should be upheld.

For the reasons assigned by Judge LAWRENCE the judgment of the Supreme Court and the order of the board of police commissioners should be reversed and the proceedings remitted for such further proceedings as may be lawful.

All concur, except FOLGER and EARL, JJ., not voting, and ANDREWS, J., absent.

Judgment reversed.

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PETER T. HOMER, Executor, etc., Respondent, v. THE GUARDIAN MUTUAL LIFE INSURANCE COMPANY, Appellant.

Defendant insured the life of B., the policy being subject to a forfeiture in case of non-payment of premiums when due. Prior to the time when a semi-annual payment of premium fell due, defendant's president signed an indorsement upon a card giving notice of the day when payment was due, as follows: "Payment extended until October 10, 1874." B. died September 19, 1874. In an action upon the policy, *held*, that the extension estopped the defendant from claiming a forfeiture and continued the policy in full force, subject only to a forfeiture by non-payment at the time to which performance was deferred; that there was no condition expressed or implied in the extension that the insured should be living at the time stated therein, or varying the original contract as a continuous contract of insurance.

Also, *held*, that the assured, by asking and accepting an extension of time and a waiver of the forfeiture, by clear implication agreed to continue the risk and to pay the premium at the day fixed, for which implied promise the extension was a good consideration; that the memorandum was sufficient to enable the court to give effect to the intent of the parties; and that therefore the extension was valid as an agreement based upon mutual promises.

(Argued November 29, 1876; decided December 12, 1876.)

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, affirming

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a judgment in favor of plaintiff's testator, entered upon a decision of the court upon trial without a jury.

This action was upon a policy of life insurance, issued upon the life of William E. Bunker, and by him assigned to plaintiff's testator.

The policy was for the term of the natural life of the insured, and contained a condition forfeiting it and all premiums paid thereon "in case the premium or premiums shall not be paid to said company on or before the time specified for the payment of the same." The premiums were to be paid semi-annually. The insured died September 19, 1874. The defence was that the policy was forfeited by the non-payment of the semi-annual premium due by the terms of the policy, August 26, 1874. Prior to that day a card notifying the insured when the premium fell due had been sent to him by defendant. This was presented to defendant's president, who made and signed the following indorsement thereon: "Payment extended until October 10, 1874." On the day named plaintiff tendered to defendant the amount of said semi-annual premium, which defendant refused to accept.

*Ashbel Green* for the appellant. The indorsement being a simple extension of the option to continue, the policy should, necessarily, have been exercised before the death of the assured. (*Howell v. Knick. Ins. Co.*, 44 N. Y., 284, 285; *Pritchard v. Life As. Soc.*, 3 C. B. [N. S.], 643; *Tyler v. N. Am. Ins. Co.*, 4 Robt., 151; *Bliss on L. Ins.* [2d ed.], 312-316; *Tarleton v. Staniforth*, 5 T. R., 695; *Simpson v. Ins. Co.*, 2 C. B. [N. S.], 257; *Want v. Blunt*, 12 East, 183; *Acey v. Fernie*, 7 M. & W., 151; *Phœ. Co. v. Sheridan*, 8 H. of L. Cas., 745; *Mut. B. Ins. Co. v. Ruse*, 8 Ga., 534; *Robert v. N. E. Mut. Ins. Co.*, 1 Disney, 355; *Blanchard v. At. Co.*, 33 N. H., 6; *Donald v. Put. Ins. Co.*, 2 Ins. L. J., 738; *Lafavour v. Ins. Co.*, 1 Phil., 558; *Worthington v. O. O. Ins. Co.*, 41 Conn., 372.) The contract, as construed by plaintiff, was void for want of consideration. (1 Pars. on Con., 427; *Burnet v. Bisco*, 4 J. R., 235; *People v. Howell*,



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id., 296; 1 Saund., 211, n. 2; *Cammeyer v. Luth. Churches, etc.*, 2 Sandf. Ch., 275; *M. and B. Plk. R. Co. v. Snedeker*, 18 Barb., 317; *Smith v. Ware*, 13 J. R., 257.) To excuse the non-payment of the premium prior to the death of the insured, it must be shown that payment was rendered impossible without fault of the insured. (*Cohen v. N. Y. Ins. Co.*, 50 N. Y., 610; *Sands v. N. Y. Ins. Co.*, id., 926; *Martine v. Inter'l Ins. Co.*, 53 id., 339; *N. Y. L. Ins. Co. v. Strathom*, 3 Centl. L. J., 723; *Robert v. N. E. Ins. Co.*, 1 Disney, 355.)

*Charles E. Miller* for the respondent. No consideration was necessary for an extension of the time for the payment of the premium. (*Washoe Tool Co. v. Hib. Ins. Co.*, 7 Hun, 74; *Leslie v. Knick. Ins. Co.*, 2 id., 616; *Bolton v. Am. M. L. Ins. Co.*, 25 Conn., 542; 1 Pars on Con. [1st ed.], 427; *Fleming v. Gilbert*, 3 J. R., 528; *Boutwell v. O'Keefe*, 32 Barb., 434; *Young v. Hunter*, 6 N. Y., 203; *Evans v. Thompson*, 5 East, 189-193; *Hasbrouck v. Tappen*, 15 J. R., 200-204.) The time specified in a policy of insurance for the payment of the premium may be extended by parol or otherwise. (*Goit v. N. P. Ins. Co.*, 25 Barb., 189; *Trustees, etc. v. B'klyn F. Ins. Co.*, 19 N. Y., 305; *Howell v. Knick. L. Ins. Co.*, 44 id., 276; *Dean v. Aetna L. Ins. Co.*, 2 Hun, 358; *Washoe Tool Co. v. Hib. F. Ins. Co.*, 7 id., 74.) Defendant, by extending the time for payment of the premium, is estopped from claiming a forfeiture. (*Dezell v. Odell*, 3 Hill, 219; *Reynolds v. Lounsbury*, 6 id., 534; *Underwood v. F. J. Ins. Co.*, 57 N. Y., 500; *Leslie v. Knick. L. Ins. Co.*, 2 Hun, 616.)

ALLEN, J. By the contract of insurance, William E. Bunker was insured for the term of his natural life, subject to a forfeiture of his policy and loss of all premiums paid, by the non-payment of the annual premiums at or before the time specified for the payment of the same. It was not a contract for insurance for a single year with liberty to the assured to renew the same from year to year, but a continuous

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contract for life. (*Cohen v. The N. Y. Mutual Life Ins. Co.*, 50 N. Y., 610; *Sands v. N. Y. Life Ins. Co.*, id., 626; *Martine v. International Life Ins. Co.*, 53 id., 339.) The forfeiture, the penalty for a non-payment of the annual dues at the day, was for the benefit of the insurers and could be dispensed with by them; and if waived or agreed to be waived at a time when the other party might have literally performed the contract and prevented a forfeiture by an agreement or a promise to accept performance at a later day, the non-performance of the condition at the day cannot be alleged to defeat the contract, and the insurers will not be permitted to insist upon a forfeiture of the policy by reason of such non-performance. This is within the familiar principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned. The authority of the president to act for the company is not disputed, and he dispensed with the performance of the condition at the day by extending the time for the payment of the premium which became due in August, 1874, and the defendant is now estopped from insisting upon a forfeiture for non-payment at the day or from alleging that the contract is not continued in full force and effect. (*Hasbrouck v. Tappen*, 15 J. R., 200; *Young v. Hunter*, 2 Seld., 203.) The time for the performance of contracts by specialty, as well as simple contracts, may be extended by parol, and when so extended it is as if the extended time was written in and made a part of the original contract, every other provision remaining intact, and to be carried out with the single modification as to time. (*Keating v. Price*, 1 J. Cas., 22; *Evans v. Thomson*, 5 East, 189; *Boutwell v. O'Keefe*, 32 Barb., 434.) The effect of giving the extension was merely to give credit for the premium due in August until the tenth day of October following and—waiving the forfeiture which, but for such dispensation, would have resulted from a non-payment at the time fixed by the policy—to continue the policy and the contract of insurance in full force as if there had been strict performance of the condition at the day, and liable only to a forfeiture by non-

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payment at the time to which performance was deferred. The premium, if then paid, would be the price of the risk for the time for which credit was given, as well as for the unexpired portion of the year, and such payment would not be the consideration for a new contract for insurance for the time yet to elapse before the expiration of the year, but for the insurance for the whole year and to continue the contract in force during every instant of time and without break or suspension. There was no condition expressed or implied in the extension varying the original contract as a continuous contract of insurance for the term of the natural life of the insured. The contract was not suspended, and a condition now sought to be implied, and which would be implied in a contract for insurance to commence *in futuro*, that the assured should be living at the day, would be repugnant to the contract which was continued in force. It cannot be intended from the simple transaction of giving time for payment of the premium — that is, giving credit instead of exacting prompt payment — the parties had in view the continuance of the contract merely to secure the benefit of it to the insurer by the payment of the premium if the peril insured against should not happen, but in case of the death of the insured before the time should elapse for its payment the contract should be void; that is, that upon the occurrence of the event constituting the peril, indemnity against which was the only object and purpose of the contract, the policy should be of no avail. This would be saying to one undertaking to pay in the future for a risk to commence *in presenti*, that his life is insured if he lives, but if he dies he is not insured. The policy was continued in full efficacy and was a valid and effective insurance at the time of the death of the insured. (*Shearman v. Niagara Fire Ins. Co.*, 46 N. Y., 526.) It needed no revival or renewal, for the reason that there was at no time, a forfeiture or any act or omission by the insured, which by the terms of the policy could work a forfeiture, the waiver of payment being the equivalent of actual payment of premium to prevent such forfeiture. (*Bodine v. Exchange Fire*

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*Ins. Co.*, 51 N. Y., 117; *Howell v. Knickerbocker Life Ins. Co.*, 44 id., 276.) The cases which have involved the construction of the terms of the policy — of which *The Phoenix Life Ins. Co. v. Sheridan* (8 H. of L. Cas., \*745), is an example — referred to by the counsel for the appellants, do not bear on the case in hand.

But another view of the transaction is fatal to the claim of the defendant. The parties intended a valid transaction at the time the assured applied for, and the insurers granted an extension for the time of the payment of the annual premium in 1874, and to this extent varied the terms of the contract. Neither the negotiation nor the agreement in all its terms and in detail was reduced to writing, but the memorandum made is sufficient to enable the court to give effect to the intent of the parties, aside from any promise by the assured to pay the premiums as they should become due, which might be implied from the policy itself, the assured by asking for and accepting from the insurers an extension of the time of payment and a credit for the premium then about to become due, and a waiver of the forfeiture and the agreement to continue the policy in life as if the premium was actually paid, by clear implication, promised and agreed to continue the risk another year and to pay the premium at the day fixed. Such promise would be implied and the waiver of the payment at the day would constitute the consideration for the promise. (*Smith v. Weed*, 20 Wend., 184; *Hinman v. Moulton*, 14 J. R., 466; *Stebbins v. Smith*, 4 Pick., 97.) This would make the agreement valid as a contract based upon mutual promises.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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Statement of case.

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JOHN PATTEN, Respondent, v. THE NEW YORK ELEVATED  
RAILROAD COMPANY, Appellant.

The subdivision 4, added to section 11 of the Code in 1865, allowing an appeal from a decision of a motion which involved the constitutionality of a State law, was repealed by the amendment of said section in 1867, which added as subdivision 4 a new and different provision; the subdivision, as thus enacted, took the place of the same subdivision as it had previously existed.

*It seems* that the subdivision so repealed did not apply to a decision of the New York Common Pleas.

(Argued December 5, 1876; decided December 19, 1876.)

MOTION to dismiss appeal from order. The nature of the order and grounds of motion are stated in the opinion.

*James Emott* and *James Matthews* for the appellant. The statutes under which defendant acted being remedial, should be liberally construed. (Potter's Dwar. on Stats., 140, 144, 145, 203, 210, 231, 239.)

*Roger A. Pryor* for the respondent. The order was not appealable. (*Van De Water v. Kelsey*, 1 N. Y., 533; *Pfohl v. Sampson*, 59 id., 175; *Brown v. Keeney*, id., 242; *Rae v. Mayor*, 62 id., 631; *People v. Schoonmaker*, 50 id., 500; *Paul v. Munger*, 47 id., 476; *Butterfield v. Ruddle*, 58 id., 489; *People v. Fowler*, 55 id., 675; *Paul v. Munger*, 47 id., 476.)

EARL, J. An appeal was taken from an order of the Special Term of the New York Common Pleas, continuing a temporary injunction restraining the defendant from doing certain acts therein mentioned. The General Term of the same court affirmed the order, and the defendant appealed to this court from the order of affirmance. This motion is now made to dismiss the appeal, on the ground that the order is not appealable.

It has been many times decided by this court that the granting, continuing and dissolving of temporary injunctions rest in the discretion of the court of original jurisdiction, and that therefore an appeal from an order granting, continuing or dissolving such an injunction cannot be taken to this court. (*Van Denwater v. Kelsey*, 1 N. Y., 533; *Paul v. Munger*, 47 id., 470; *People v. Schoonmaker*, 50 id., 500; *Pfohl v. Sampson*, 59 id., 175; *Brown v. Keeney Settlement Cheese Co.*, id., 242; *Rae v. Mayor, etc.*, 62 id., 631.) But the defendant seeks to take this appeal out of this general rule, by virtue of an amendment to the Code first adopted in 1865. In that year, section 11 was amended by adding thereto subdivision 4, reading as follows: "Whenever the decision of any motion heretofore made, or of any motion hereafter to be made, in the Supreme Court of this State, at a Special Term thereof, involves the constitutionality of any law of this State, or has been, or shall be, placed in the opinion or reasons for such decision of the justice making such decision, upon the unconstitutionality of such law, then an appeal shall lie, and may be made, from such decision," etc., to the General Term and to the Court of Appeals. The decision in this case was based both at the Special and General Terms of the Common Pleas, upon the unconstitutionality of a law of this State.

It will be observed that this provision of the Code applies by its terms only to decisions made in the Supreme Court, and it may well be claimed, therefore, that it does not apply to this case, where the decision complained of was made in the Common Pleas.

But it is unnecessary to determine whether, upon any permissible construction of the provision, it could be applied to such a case as this, as the entire provision ceased to be any part of the law of this State more than nine years ago. In 1867 section 11 was amended by adding, as subdivision 4, the following: "An appeal from any order to the Court of Appeals affecting a substantial right arising upon any interlocutory proceeding, or upon any question of practice in the action, may be heard as a motion and noticed for hearing for

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any regular motion day of the court." Subdivision 4, as thus enacted, took the place of the same subdivision as it had previously existed.

In 1869 it was again enacted (§ 3, chap. 883) as follows: The fourth subdivision of the eleventh section of said act (the Code) is hereby amended so as to read as follows: "An appeal from an order to the Court of Appeals affecting a substantial right, etc., may be heard as a motion," etc.

In 1870 subdivision 4 of section 11 was again, and for the last time, amended so as to read as follows: "In an order affecting a substantial right not involving any question of discretion arising upon any interlocutory proceeding, or upon any question of practice in the action, etc., may be heard as a motion," etc.

From this brief review of the amendments to subdivision 4 of section 11 of the Code, it will be seen that the provision first above referred to, under which it is sought to uphold this appeal, has been no part of the Code since 1867.

The appellate jurisdiction of this court is carefully limited and defined in the Code, and we cannot with propriety extend it to meet the supposed exigencies of any case, even with the consent of the parties.

It follows that the appeal must be dismissed, with costs.

All concur; ALLEN, FOLGER and RAPALLO, JJ., concur in result, on ground that statute does not give jurisdiction to appeal from such orders of the Court of Common Pleas.

Appeal dismissed.

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**RICHARD O'GORMAN, Appellant, v. THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, Respondents.**

The provision of the act of 1870 making "further provision for the government of the city of New York" (chap. 383, Laws of 1870), vesting in the comptroller of the city the power to fix the salary of the corporation counsel at a sum not exceeding the salary of the recorder, did not repeal the provision of the act of 1854 (§ 1, chap. 122, Laws of 1854),

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giving to said counsel an annual compensation for his services in street opening cases, to be assessed upon the lands benefited.

Nor was the said provision repealed by the provisions of the city charter of 1857 (chap. 446, Laws of 1857), or of the charter of 1870 (chap. 137, Laws of 1870), enumerating, among other duties of the corporation counsel, that of conducting the legal proceedings in opening streets, etc., and prescribing the mode of fixing his salary.

Although, as a general rule, where a statute prescribes the duties to be performed by an officer and the mode of fixing his salary, the necessary implication is that the salary so fixed is intended as a full compensation for all the prescribed duties, and supersedes all previous statutory enactments making special compensation for any of them; that rule does not apply where there are special enactments showing that it was intended that the officer should receive compensation for certain services in addition to his salary and payable ultimately from a different source.

(Argued November 28, 1876; decided December 12, 1876.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of defendant, entered upon an order overruling plaintiff's demurrer to the answer of defendant. The facts sufficiently appear in the opinion.

*A. J. Vanderpool* for the appellant. A statute affecting the compensation of an officer when the words admit of two interpretations should be construed in the way most favorable to the claim of the officer. (*U. S. v. Morse*, 3 Story, 87.) Repeal by implication is not favored in the law. (*Wood v. U. S.*, 16 Peters, 362; *State v. Bishop*, 41 Mo., 16; *Spratt v. Huntington*, 4 N. Y. S. C. R., 554, 555; *People v. Palmer*, 52 N. Y., 88; 59 id., 434; 50 id., 493, 497; *Fosdick v. Perrysburg*, 14 Ohio St., 472; *McKeer v. Delancy*, 5 Cranch, 22; *Monison v. Barksdale*, Harp [S. C.], 101; *Kemion v. Hills*, 1 La. Ann., 419; *Union Ins. Co. v. Hoge*, 21 How., 35; *Chegaray v. Jenkins*, 3 Sandf., 409; *Mahoney v. Wright*, 10 Con. L. R., 420; *McCool v. Smith*, 1 Black, 459; *Naylor v. Field*, 29 N. J. L. [5 Dutch.], 287; *State v. Berry*, 12 Iowa, 58; *U. S. v. Twenty-five Cases of Cloths*, Crabb, 356; *People v. San Francisco, etc.*, *R. R. Co.*, 28 Cal., 254; *People v. Durick*, 20 id., 94; *Blain v. Bailey*, 25 Ind., 165;



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*Conner v. Southern, etc., Co.*, 37 Ga., 397; *People v. Barr*, 44 Ill., 198; *McDonough v. Campbell*, 42 Ill., 490; *Hume v. Gossett*, 43 id., 297; *Lichtenstein v. State*, 5 Ind., 162; *Cassey v. Harned*, 5 Iowa, 1; *Loper v. Brookline*, 13 Pick., 342; *Haynes v. Jenks*, 2 id., 172; *Buckingham v. Steubenville*, 10 Ohio St., 25; *Hockaday v. Wilson*, 1 Head [Tenn.], 113; *Furman v. Nichols*, 3 Cold. [Tenn.], 432; *Snell v. Bridge-water Co.*, 24 Pick., 296; *Goddard v. Boston*, 20 id., 407; *Bowen v. Lease*, 5 Hill, 221; *Wyman v. Campbell*, 6 Port. [Ala.], 219; *State v. Morrow*, 26 Mo., 131; *Cole v. Suprs.*, 10 Iowa, 552; *Pratt v. Atlantic, etc., R. R. Co.*, 112 Me., 578; *Richards v. Patterson*, 30 Miss., 583; *Dugan v. Gittings*, 3 Gill [Md.], 583; see *Corwin v. Moore*, 15 Ga., 361; *Erwin v. Moore*, 15 id., 861; *Tyson v. Postlethwaite*, 13 Ill., 727; *Shelter v. Baldwin*, 26 Miss., 439; *Robbins v. State*, 8 Ohio St., 131; *Smith v. Hickman*, Cooke [Tenn.], 330; *McCarter v. Orphan Asylum*, 9 Cow., 437; *State v. Woodside*, 9 Ired. [N. C.], 496; and see *Alexandria v. Dearman*, 2 Sneed [Tenn.], 104; *Williams v. Potter*, 2 Barb. [N. Y.], 316; *Ament v. Humphrey*, 3 Iowa, 255; *Attorney-General v. Brown*, 1 Wis., 513; *Bruce v. Schuyler*, 9 Ill., 221; *Brown v. Miller*, 4 J. J. Marsh., 474; *Planters' Bk. v. State*, 14 Miss., 628; *White v. Johns*, 23 id., 68; *State v. Macon Co.*, 41 Mo., 453; *Street v. Commonwealth*, 6 Watts. & V., 209; *Shinn v. Commonwealth*, 3 Grant Cas., 205; *McLaughlin v. Hoover*, 1 Oreg., 31; *Nixon v. Piffet*, 16 La. An., 379; *DePauw v. New Albany*, 22 Ind., 204; *Mullen v. People*, 31 Ill., 444; *Elliott v. Lochname*, 1 Kan., 126; *Robbins v. State*, 8 Ohio St., 131; *Smith v. Hockman*, Cooke [Tenn.], 330; *McCartee v. Orphan Asylum*, 9 Cow., 437; *State v. Woodside*, 9 Ired. [N. C.], 496; *Alexandria v. Dearman*, 2 Sneed [Tenn.], 104; *Van Rensselaer v. Snyder*, 9 Barb., 308; Sedgwick on Statutes [ed. 1874], 102, note; *People v. Durick*, 20 Cal., 94; *Lewis v. Stout*, 22 Wis., 234; *Attorney-General v. Brown*, 1 id., 513.)

*D. J. Dean* for the respondent.

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Opinion of the Court, per RAPALLO, J.

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RAPALLO, J. By chapter 122 of the Laws of 1854, section 1, it was enacted that no costs, fees or charges should thereafter be allowed to the counsel of the corporation for the performance of services then required by law to be rendered by him in street opening cases, and certain other proceedings for improvements of public places specified in the act, but that in lieu thereof the counsel to the corporation should receive after the first of January, then next, the sum of \$6,500 per annum, to be paid quarterly by the mayor, etc., of the city of New York. The act saved, however, the right of the corporation counsel to his costs for all services rendered in such proceedings prior to the 1st of January, 1855, and also in all proceedings pending on that day, at the rates customarily taxed before the passage of the act. The act further provided (§ 2) that all moneys paid under its provisions should be assessed proportionally, as far as practicable, upon the lands benefited by the improvements.

The complaint alleged that Mr. O'Gorman, the plaintiff, held the office of counsel to the corporation during the whole of the year 1871, and until the 3d of December, 1872. That the defendant had paid him, in addition to his regular salary, the allowance made by the before-mentioned act of 1854, up to the month of October, 1871, but that on and after that date it refused to pay the allowance, and this action is brought to recover so much of it as accrued from the 1st of October, 1871, to the 1st of December, 1872.

It is alleged in the complaint, and not denied in the answer, that during the period for which he claims this compensation, he rendered various services in proceedings of the description mentioned in the act of 1854. That for many years previous to the passage of that act, the costs, fees and charges in such proceedings were always paid by the defendant to the counsel to the corporation, in addition to his salary, and distinct therefrom, which salary was always duly fixed from time to time by the defendant, as provided by law. And that from the 1st of January, 1855, to the 1st of October, 1871, the allowance of \$6,500 per annum was always paid by the defendant to the corporation counsel, in pursuance of the act of 1854, in

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Opinion of the Court, per RAPALLO, J.

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addition to his salary, and provision for such payments has been made from to time by the legislature at the request of the defendant.

The only defence set up by the answer is, that the before-recited provisions of the act of 1854 have been repealed by chapter 383 of the Laws of 1870. That immediately after the passage of that act, the comptroller, in pursuance thereof, fixed the salary of the plaintiff at \$15,000 per annum, which thereupon became the only salary or compensation which the plaintiff was entitled to receive for his services in street openings, etc., and for the performance of all duties incident or appurtenant to his office. That afterwards his salary was reduced to \$12,000 by the board of apportionment, in pursuance of chapter 583 of the Laws of 1871, and that his salary has been paid to him.

To this answer the plaintiff demurred, and the Court of Common Pleas gave judgment for the defendant on the demurrer, which was affirmed at General Term.

The provision of chapter 383 of the Laws of 1870, upon which the defendant relies in support of its answer, is in the following words (Laws of 1870, p. 882): "The counsel to the corporation and the corporation attorney shall receive an annual salary to be fixed by the comptroller, not exceeding the annual compensation paid to the recorder of said city."

It is not claimed that there is any express repeal of the act of 1854, but it is argued that it is inconsistent with the last-recited provision, and therefore repealed by implication.

At the time of the passage of this act of 1870, and for very many years previously, the corporation counsel had been in the receipt of an annual salary, raised by general taxation and paid out of the city treasury, and, in addition thereto, as has been shown, had received, pursuant to law, a separate compensation for services in proceedings for local improvements. The burden of this additional compensation was not borne by the city, but was assessed upon the property benefited by the improvements. Prior to 1854, this compensation was obtained by him in the shape of taxed costs in the several pro-

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ceedings, and these costs were included in the expenses of the improvement, and formed part of the aggregate amount assessed upon the property. As appears from the uncontroverted allegation of the complaint, these costs were very large, amounting at times to \$25,000 per annum. By the act of 1854 the compensation which he was allowed to receive for these specific services was limited to \$6,500 per annum, and this sum, although advanced in the first instance by the corporation, was ultimately payable by the property owners, and not like the salary, by general taxation. It was directed to be assessed proportionally, as far as practicable, upon the property benefited by improvements. This system continued during a period of upwards of fifteen years, viz., from 1855 to 1871, without any question being raised as to the allowance in lieu of costs being in addition to the salary. During this period the power of fixing the salary of the corporation counsel was vested in the common council. In 1848 it was fixed by them, as appears from the pleadings, at \$3,500 per annum, and it does not appear that any change was made in this amount until 1870, when the provision in question was enacted. By this provision the power of fixing his salary was transferred to the comptroller of the city, and the amount was limited to a sum not exceeding the salary of the recorder. We are unable to perceive any other change effected by this act of 1870. The enactment that he should receive an annual salary effected no change, for he had, for many years, been receiving one, and the omission of any provision that he should be prohibited from receiving any other emoluments, is, in view of the fact that he was at that time receiving, in pursuance of law, this additional allowance in lieu of costs, indicative of an intention on the part of the legislature not to disturb the existing system, or to interfere with any thing except the regular annual salary payable out of the city treasury, and this intention is still more apparent by reference to previous, cotemporaneous and subsequent legislation upon the subject. It would require a very forced construction of this act of 1870 to give it the effect claimed by the answer.

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It can hardly be presumed that the legislature intended, in this silent and obscure manner, to relieve the owners of property benefited by local improvements from the expense of the legal proceedings required to effect them, and to cast that burden upon the city at large in the shape of an increase of the salary payable to the counsel to the corporation out of the city treasury. Such a measure would be at variance with the general policy of legislation on the subject of local improvements, and some more clear expression of intention than is to be found in the act of 1870 would be required, to convince us that the legislature had in view a repeal which would lead to that result. Whether the comptroller in fixing the salary at \$15,000, or the board of apportionment in retaining it at \$12,000, were actuated by the idea that the increased salary would cover the expenses of street openings, etc., or whether the increase was made in view of the increased amount of litigation to which the city is a party, and which has of late swelled to a magnitude never before approached, is immaterial to the present inquiry. The action had under the act of 1870, cannot affect its construction. That must be the same whether the salary is fixed at \$15,000 or at \$5,000 per annum.

But it seems to us that in all the legislation affecting this subject, an intention is apparent to preserve the system of separating from the salary of the corporation counsel this allowance in lieu of costs in street opening and similar cases, and retaining it as a part of the expenses of the improvements. The charter of 1857 (Laws of 1857, chap. 446, § 44) contains a general provision that no officer under that charter shall have or receive from the corporation or city treasury, any perquisites or any compensation or commission for his services, except a salary. But the counsel to the corporation (with some other officers named) is expressly excepted from the operation of this prohibition. It also provides that the salaries of all the officers shall be prescribed by ordinance of the common council. It is apparent that it was intended that the corporation counsel might receive compensation in addition

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to his salary, and we have not been informed of any such additional compensation payable out of the city treasury which he could claim, except that provided by the act of 1854. The charter of 1870, passed at the same session as the act now under review, contains the same provision precisely, excepting the corporation counsel from the general prohibition against receiving compensation other than salary, and vests the power of fixing his salary in the common council.

In addition to the presumption arising from these provisions of the charters, we find an express recognition by the legislature in acts passed subsequent to the passage of chapter 383 of the Laws of 1870, and at the same session, of the continued existence of the allowance to the corporation counsel, which is claimed to have been impliedly abrogated by that act. Chapter 383 was passed April 26, 1870. On the 31st of May, 1870, an act was passed making certain alterations in the map or plan of the city of New York (Laws of 1870, chap. 805), and it was therein provided as follows: "And it shall be the duty of the counsel to the corporation of the city of New York, to perform all the legal services required of him in the proceeding authorized by this act, without any additional compensation beyond the salary and allowance now provided by law. On the 9th of June, 1870, another act was passed (Laws of 1870, chap. 806), in relation to certain streets in the city of New York, which contains a provision requiring the counsel to the corporation to acquire title to certain lands, closing in these words: "And he shall perform all necessary legal services in the proceedings authorized by this act, without any additional compensation beyond the salary and allowances now provided by law."

Such a recognition of the continuance of a statutory provision, claimed to be repealed, has been held by this court to overcome the effect of a general express repeal broad enough to include the provision in question. (*Smith v. People*, 47 N. Y., 330.)

*A fortiori* it should overcome an alleged repeal attempted to be established merely by implication.

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The court below, at General Term, rest their decision, however, rather upon the charters of 1857 and 1870 than upon chapter 383 of the Laws of 1870. In the learned opinion, there delivered, it is said that when a statute prescribes numerous duties to be performed by an officer, and the mode of fixing his salary, the necessary implication must be that the salary so fixed is intended to constitute a complete compensation for all the prescribed duties and supersedes all previous statutory enactments making special compensation for any portion of these duties, and the learned judge refers to the provisions of the charters of 1857 and 1870, which enumerate, among the duties of the corporation counsel, that of conducting the proceedings for opening, altering and widening streets, etc., and prescribe the mode of fixing his salary, and he holds that such salary necessarily covers his compensation for the enumerated services.

It must be observed that that is not the defence set up by the answer to which the present demurrer is interposed; also, that if it is a good defence now, the same defence has existed since 1857, yet it appears that no such position was ever taken by the city, but it continued to pay the allowance under the act of 1854 down to the year 1871. But it further appears that before the act of 1854 was passed, the charter amendments of 1849 (Laws of 1849, chap. 187, § 18) had enumerated the duties of the corporation counsel in the same terms as were subsequently repeated in the charter of 1857, including the charge of opening, widening and altering streets. He was at that time, and always had been, in the receipt of an annual salary fixed by the common council pursuant to law. If enumerating among his duties the proceedings in street cases was sufficient to supersede all existing laws providing compensation for those services, the act of 1849 wiped out the right to costs in those cases, to be collected by assessment, which he then enjoyed. But it is apparent that the legislature did not so regard it, for by the act of 1854, which states, in terms, that the services in question were then required by law, they not only recognized his right to costs for those ser-

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vices in the past, but provided that he might continue to collect such costs for services rendered up to January 1, 1855, and also in all proceedings pending on that day, and that for the future he should have \$6,500 per annum in lieu of such costs, to be assessed ultimately on property benefited. The re-enactment in the charters of 1857 and 1870 of the provision of the charter of 1849, which made it his duty to conduct those proceedings, cannot surely be deemed to supersede the legislative provision for additional compensation therefor, made in 1854, when it is seen that such provision for extra compensation was made in view of the previously existing law of 1849, which imposed the same duty upon him, and that the charters of 1857 and 1870 both clearly recognize that he may receive compensation in addition to salary.

Although we assent to the soundness of the proposition of the learned judge, as a general rule, yet it must yield to special enactments showing that it was intended that the officer should receive compensation for certain services, in addition to his salary, and payable ultimately from a different source.

After a careful consideration of the case, we are satisfied that the plaintiff is clearly entitled to the compensation claimed, and that the judgment below must be reversed and judgment rendered for the plaintiff on the demurrer.

All concur.

Judgment reversed.

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STEPHEN B. BRAGUE, Respondent, v. THOMAS LORD et al.,  
Executors, etc., Appellants.

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This action was brought, among other things, to recover for plaintiff's services as attorney, alleged to have been rendered to L., defendants' testator. The defence was, that the services were rendered for one B. Upon the trial plaintiff was allowed to testify, under objection, that he was introduced by B. to L.; that B. and L. talked of a power of attorney they had given, and that they agreed, on the advice of the witness, to revoke it, which was done; also, that at another time when



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L., his brother, and witness were present, L. said to his brother, "we cannot tell what we will have to pay until we know what our lawyer's charges are," turning his head to the witness. *Held*, error; that the evidence was incompetent, it being in regard to personal communications and transactions within the meaning of section 399 of the Code.

(Argued November 23, 1876; decided December 19, 1876.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

The nature of the action and the facts sufficiently appear in the opinion.

*Charles A. Davison* for the appellants.

*S. Jones* for the respondent. The evidence offered by plaintiff was admissible under section 399 of the Code. (*Simmons v. Sisson*, 26 N. Y., 264; *Lobdell v. Lobdell*, 36 id., 327; *Cary v. White*, 59 id., 336.)

RAPALLO, J. This action was brought to recover for services rendered by the plaintiff, who is an attorney at law, to Rufus L. Lord, deceased, the defendant's testator, in relation to the recovery of certain stolen property, and also for part of a reward which had been offered for the recovery and restoration of the property.

The property stolen consisted of bonds and securities, part of them the property of Mr. Lord, and part the property of a Mr. Barron. After the larceny, the plaintiff acted as the attorney for Mr. Barron in the matter, and claims that while so acting, he was introduced by Mr. Barron to Mr. Lord, and, afterwards, acted as attorney for Mr. Lord, and upon his retainer, in the same matter. The defences upon the trial were, that the services rendered by the plaintiff in the matter were rendered on the retainer of Mr. Barron, and not on the retainer of Mr. Lord; and also, that whatever the plaintiff did in the matter for Mr. Lord, was done with the expectation of

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Opinion of the Court, per RAPALLO, J.

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earning the reward, and not upon any employment by Mr. Lord nor any understanding that Mr. Lord should compensate him therefor.

The plaintiff introduced evidence of various services rendered by him in the matter, such as the preparation or correction of circulars, drawing affidavits, attending examinations in the Police Court, giving instructions to detectives, attending consultations with Mr. Lord and Mr. Barron, conducting correspondence, etc., etc.; and also, the testimony of detectives that Mr. Lord referred them to him for instructions and information and for the payment of disbursements. He also testified to certain conversations between Mr. Lord and Mr. Barron, at which he was present and in which he took part; and the principal exceptions in the case arise upon the admission of his testimony as to these conversations, the appellants claiming that he was permitted to testify to them in violation of the three hundred and ninety-ninth section of the Code.

The plaintiff was allowed to testify that he was introduced by Mr. Barron to Mr. Lord as his, Mr. Barron's, attorney; that on that occasion Mr. Barron and Mr. Lord talked of a power of attorney they had given, and that they agreed together, on the advice of the witness, to revoke that power — which was done. On a subsequent occasion, the witness testifies to an interview between himself, Mr. Lord, and his brother, Mr. Thomas Lord, at which, he says, the subject of payment for his services arose; that it was during a negotiation as to an amount to be paid in London, and Mr. Rufus L. Lord said to Mr. Thomas Lord, "We cannot tell what we will have to pay until we know what our lawyer's charges are," turning to plaintiff — the three being together — turning his head towards plaintiff. Other conversations at which plaintiff was present, and in which he took part, were testified to by him, he being instructed to state only what was said between Mr. R. L. Lord and Mr. Barron, or Mr. Thomas Lord, as the case might be, and to leave out what was said by or to the plaintiff. Questions are raised in respect to these conversations which are not free from difficulty; but it is sufficient for the purposes

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of the present appeal, to pass upon the exceptions taken to the admission of the two conversations above particularly referred to.

We think these exceptions were well taken. Advice given by the plaintiff to Mr. Lord, was a personal communication and transaction between them, within the meaning of the three hundred and ninety-ninth section, and connected with the proof that Mr. Lord accepted and acted upon such advice, the evidence was material, and tended to maintain the issue on the part of the plaintiff. Mr. Lord's remark about what he would have to pay his lawyers, turning towards plaintiff, appears to have been addressed to plaintiff as well as to Mr. Thomas Lord, and may have satisfied the jury that Mr. Lord looked upon plaintiff as his lawyer throughout the transaction, and conceded that he would have to pay him as such.

The remark to Mr. Thomas Lord about paying their lawyers, did not of itself, amount to much. It derived its significance wholly from the alleged turning towards plaintiff, and thus giving him to understand that he was the party referred to. This, we think, was a personal communication, within the intent of the three hundred and ninety-ninth section.

The Superior Court, at General Term, in the opinion there delivered, concede that the admission of this testimony was error, but they hold that it could not have injured the defendants, because there was uncontradicted evidence in the case on which the jury would have been bound, as matter of law, to find for the plaintiff on the issue as to which the conversation of the deceased related.

There was, undoubtedly, evidence outside of these conversations which would have justified the jury in finding that some part of the services rendered by the plaintiff were rendered by him as attorney of Mr. Lord, and on his employment. But there was also evidence tending to show that he was looking to the reward, and that the labor which he performed, or a part of it at least, was performed with the view of earning the reward. In his complaint he claims, in one count, for services rendered, and in the other, the same sum

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as his proportion of the reward. It appears by his letter to Mr. Lord, of May 18, 1867, that he undertook a suit against one Lynch, for the recovery of some of the stolen bonds, on condition that if he did not succeed he was to make no charge for his services, and in a subsequent letter relating to the same suit, he proposes to substitute another attorney therein on payment of his costs, stating that in case of recovery he would be entitled to the reward, but he prefers giving a substitution. And it also appears that in May, 1867, Mr. Lord paid him \$500, for which he gave a receipt, not on account of services, but to be deducted from the first reward to which he might be entitled. The reward was a certain per centage on all bonds recovered. This evidence tends to show that he had the reward in view, and looked to this contingent compensation for part, if not all, of his services, the principal item of which was for advice, consultations, attendance, etc.; while the conversation given in evidence tended to show that Mr. Lord regarded him as his lawyer throughout, and entitled to pay as such. To sustain a verdict when evidence has been erroneously admitted, it must very clearly appear that no injury could possibly have resulted from the error. We cannot see this so clearly as to justify us in upholding the judgment on that ground.

Another insuperable difficulty, however, stands in the way of sustaining this judgment. The plaintiff, as before stated, claims in his complaint a portion of the reward as well as compensation for services. The court, at the trial, after having charged the jury that if the plaintiff undertook the services with a view of receiving a part of the reward offered for the recovery of the bonds, and with that intention alone, the defendants would be entitled to their verdict, further added at the request of the plaintiff's counsel, that even if the plaintiff stood on the reward alone, yet, if the jury found that the bonds were recovered through plaintiff's exertions, he was entitled to recover. The court had refused to charge at the request of defendant's counsel, that the plaintiff had failed to show that the return of the bonds, or any of them, was pro-

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cured through the exertions or instrumentality of the plaintiff, and also that he had failed to show any right to recover any part of the reward.

The jury were therefore instructed, in substance, that they might render a verdict for part of the reward. We have carefully examined the testimony and fail to find any evidence upon which such a verdict could be based. It was shown that the greater portion of the bonds had been recovered, but we do not find in the case a particle of evidence showing that the plaintiff brought about such recovery, or was entitled to any part of the reward. The defendants were entitled to have the jury so instructed, and it was error to submit to the jury to determine whether the plaintiff had earned any part of the reward.

The plaintiff appears to have rendered meritorious services, and it is to be regretted that this litigation should be prolonged, the case appearing to have already been twice tried. But the view we take of the legal questions raised requires us to reverse the judgment and order a new trial, costs to abide the event.

All concur; FOLGER, J., in result.

Judgment reversed.

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PATRICK FLYNN et al., Administrators, etc., Respondents, v.  
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED  
STATES, Appellant.

F. having applied for an insurance upon his life, a physician, who was medical examiner of the defendant, and who was also the medical attendant of the applicant, called upon him to make the medical examination and to take and receive his application. The physician filled up the entire application, asking the questions and inserting the answers. F. gave full and accurate information in response to the questions before the answers were written, but the answers, as written by and under the advice of the physician, were some of them untrue. A policy was issued by which the statements in the application were made warranties. In an action upon the policy, *held* (CHURCH, Ch. J., and MILLER, J., dis-

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senting), that the physician was not the agent of the company for the purpose of soliciting or filling out applications, nor was such authority incident to, or within, the apparent scope of his agency as medical examiner; that it therefore was not bound by his acts; and that by the breach of warranty the policy was forfeited.

*Flynn v. Equitable Life Assurance Society* (7 Hun, 387) reversed

(Argued November 29, 1876; decided December 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of the plaintiffs, entered upon a verdict.

This action was upon a policy of life insurance issued by defendant upon the life of John H. Flynn, plaintiffs' intestate,

By the policy, the declarations and statements made in the application were warranted by the assured "to be in all respects true and without the suppression of any facts relating to the health or circumstances" of the assured, and it was declared that the violation of this condition in any respect rendered the policy null and void.

The application contained, among others, the following interrogatories:

"Whether the applicant ever had disease of the kidneys, disease of the bladder, diseases of the brain and nervous system, any serious illness or local disease." The answer was: "Whooping-cough, measles; no effects from them." The application also contained a direction for him to give the name and residence of his usual medical attendant, and to state "on what occasions and for what diseases he had required his attendance and advice." His answer was: "Ransom H. Vedder, Chatham Center; nothing but debility and slight bilious difficulty."

The application also contained the further interrogatory, whether he had "consulted any other medical man, if so, for what, and when?" The answer was, "No."

It was further made a condition of the insurance that any untrue or fraudulent answers, or any suppression of facts in regard to the health of the party, should render the policy null and void. It appeared on the trial that, in 1866 and

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1867, the assured had some serious disease of the bladder or urinary organs, and had been operated upon therefor in the hospital in New York; and that he had also consulted doctors not named by him in his application; also, that, in 1869, he had given indication of brain difficulty or disease, which, however, it would seem, was of short duration.

The evidence given on the part of the plaintiff to meet and answer these facts, and the rulings of the court thereon, are set forth in the opinion.

*Ashbel Green* for the appellant. The medical examiner was not authorized to represent defendant as agent. (*Harris v. Wilson*, 1 Wend., 511; *Small v. Smith*, 1 Den., 586; *Storey v. Brennan*, 15 N. Y., 526.) He had no power, in his capacity as medical examiner, to change the contract. (*Foot v. Aetna L. Ins. Co.*, 61 N. Y., 571; *Smith v. Aetna L. Ins. Co.*, 49 id., 211; *Vose v. Eagle Ins. Co.*, 6 Cush., 42; *Nat. L. Ins. Co. v. Minch*, 53 N. Y., 151; *Valton v. Nat. L. Ins. Co.*, 1 Bigelow Cas., 453, note.) The knowledge of an agent of defendant of the falsity of the answers contained in the written application would not entitle plaintiffs to recover. (4 Daly, 285; 61 N. Y., 571; 6 Cush., 42.)

*Robert Payne* for the respondents. The representations and advice of the medical examiner to the insured, when the application was taken, bound defendant; his acts being within the apparent scope of his authority became the acts of defendant. (*Plumb v. Cat. Co. Mut. Ins. Co.*, 18 N. Y., 392; *Rouley v. Empire Ins. Co.*, 36 id., 550; 4 Abb. Ct. App. Dec.; 3 Keyes, 557; Bliss on L. Ins. [2d ed.], §§ 276, 280, 291; *Mersereau v. Phoenix Mut. L. Ins. Co.*, 2 N. Y. W. Dig., 585; 20 Wal., 560; 51 N. Y., 117; 26 id., 460; 57 Barb., 619; 10 Abb. [N. S.], 166; *Pierce v. Nashua Ins. Co.*, 9 Am. R., 235; *Miner v. Phoenix Ins. Co.*, id., 479, 482; *Clark v. Un. Mut. Ins. Co.*, 40 N. H., 333; *Masters v. Mad. Co. Mut. Ins. Co.*, 11 Barb., 624; *Protection Ins. Co. v. Harmer*, 2 Ohio St., 452; *Beal v. Park F. Ins. Co.*, 16 Wis.,

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241; *Hough v. City F. Ins. Co.*, 29 Conn., 10; *Kelly v. Troy F. Ins. Co.*, 3 Wis., 268; *How. F. Ins. Co. v. Bruner*, 23 Penn. St., 50; *Ames v. N. Y. Un. Ins. Co.*, 14 N. Y., 253; *May v. Buckeye Mut. Ins. Co.*, 25 Wis., 291; *Col. Ins. Co. v. Cooper*, 50 Penn. St., 331.) Defendant was estopped from showing that the health of the insured was different from what it had, through its agent, declared in the application. (14 N. Y., 253; *Alexander v. Ger. F. Ins. Co.*, 5 Sup. Ct. R., 208; *Am. L. Ins. Co. v. Mahone*, 21 Wal., 152; *Ins. Co. v. Wilkinson*, 13 id., 222; *Boos v. World Mut. Ins. Co.*, 6 Sup. Ct. R., 364; *Baker v. Home L. Ins. Co.*, Ct. App. M'ch 2, 1876.)

EARL, J. It is undisputed that certain statements contained in the application for the insurance as to the health of the assured and the physicians whom he had consulted were untrue, and that he should, on that account, have been defeated at the Circuit but for the evidence of Dr. Vedder.

The evidence tends to show that one Corey was the agent of the defendant to take applications for insurance. It does not appear where he resided nor how extensive his powers were. The utmost that can be claimed is that he was an agent to solicit and take applications for insurance.

Some time before April 20, 1871, the day on which the application was written, the assured applied to some one (it does not appear to whom) for insurance upon his life. Dr. Vedder was at the time one of the medical examiners of the defendant for the section of country in which the assured resided. He was also the usual medical attendant of the assured. He received a letter from Corey in reference to the insurance and then called upon the assured to make the medical examination and take and receive his application. It does not appear where the blank application came from, nor whether the assured or Dr. Vedder produced it. He informed the assured that he had come to examine him for a life policy and then took the blank application and commenced to ask the questions therein contained and insert the answers.

In answer to a question whether the assured had had any



one of the numerous diseases mentioned (among them disease of the bladder, disease of the kidneys, disease of the brain and nervous system), he replied, "You know that little sickness that I had down yonder?" alluding to a time some two years before, when, for a brief period, he was insane, and the doctor replied, "we called that insanity; but we were a little mistaken, it was nothing more nor less than an undue excitement from a specific cause, and it is not worth while to make mention of it." The assured also called his attention to the fact that he had had some difficulty about his kidneys or bladder, and that Dr. Van Buren, of New York, thought he had the gravel. Dr. Vedder said that Dr. Van Buren was mistaken, and that he had prescribed for him and cured him. The doctor then wrote in the application in answer to the question, "Whooping cough, measles — no effects from them," omitting all mention of the kidney, bladder or gravel difficulty. In answer to the question, "Has the person had any serious illness, local disease or personal injury?" the doctor advised him that he had known him for ten years and he had had no serious illness, and wrote "No" for the answer. After the assured had answered the question as to his usual medical attendance, the following question was read to him: "Have you consulted any other medical man; if so, for what and when?" and under the advice of Dr. Vedder "No" was written for the answer.

Now, all these answers were, in fact, untrue. They were all given as they appear under the advice of Dr. Vedder, and he wrote them and filled up the entire application and it was then signed by the assured.

The doctor then made his medical examination and reduced it to writing and then sent the application with his medical report annexed, to the agent, Corey, and the policy was subsequently issued, based upon the application. The judge at Special Term, while holding but for the evidence of Dr. Vedder that the plaintiff could not recover, held that if the jury believed the doctor's evidence, then he was the agent of the defendant and the defendant was bound by what he did; that

it could not complain of answers which it, through its agent, advised the assured to give and wrote in the application.

In the disposition of this case I will assume that there was no collusion between the assured and Dr. Vedder, and that the assured gave to the doctor full and accurate information as to all the questions asked before his answers were written, and yet I reach a conclusion adverse to the plaintiffs.

Doctor Vedder testified that he had never been appointed the agent of the defendant to procure applications for insurance, and that he had never acted as such. He was simply the medical examiner of the defendant, and was never held out by it as an agent for any other purpose. As medical examiner it was simply his duty to ascertain and report to the company the physical condition and state of health of an applicant for insurance, by filling up the blank report and obeying the instructions furnished to him. (Reynolds on Life Assurance, 123; Bunyan on Life Assurance, 51; Angell on Life and Fire Insurance, § 283.) He had no authority from the defendant to solicit applications for insurance, or to fill up applications, and such authority was not incident to his agency as medical examiner, nor within the apparent scope of such agency. The assured did not apply to him for insurance, and the doctor did not even claim to him that he had any authority except to examine him for insurance. It does not appear that the defendant even knew that the doctor had any thing to do with procuring and writing this application, and hence it in no way ratified his acts. He, therefore, had no more authority to act for the defendant in taking and writing this application than any other friend of the deceased would have had. His medical report, which he, as medical examiner, was required to make, was a matter distinct from the application. That was made upon his responsibility, was signed by him alone, and was in no way part of the policy. But the application was the act of the assured, for which he was responsible, was signed by him and made part of the policy.

There are cases to be found in the books where insurance companies have been held bound by misstatements contained

## Statement of case.

in applications made or written by or under the advice of their agents authorized to solicit insurance and take applications. (*Plumb v. Cattaraugus County Mutual Insurance Co.*, 18 N. Y., 392; *Rowley v. Empire Ins. Co.*, 36 id., 550; *American Life Insurance Co. v. Mahone*, 21 Wallace, 152; *Miner v. Phoenix Ins. Co.*, 9 Am. Rep., 235; *Baker v. Home Life Ins. Co.*, decided in this court, but not yet reported.\*) But without now stopping to inquire what the true rule in such cases should be, this is not like any of the cases cited. Dr. Vedder was not the agent of the company in reference to the application, and hence the company was not bound by any thing he did in reference thereto.

It follows from these views that the judgment must be reversed and new trial granted, costs to abide event.

All concur, except CHURCH, Ch. J., and MILLER, J., dissenting.

Judgment reversed.

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THE PEOPLE OF THE STATE OF NEW YORK, Respondents, v.  
JOHN McCANN, Appellant.

The provision of the insurance law of 1853 (chap. 463, Laws of 1853), as amended in 1862 (chap. 300, Laws of 1862), and in 1865 (chap. 328, Laws of 1865), which provides for the incorporation of companies to make insurance, among other things, "against loss, damage or liability arising from any unknown or contingent event whatever, which may be the subject of legal insurance," except fire, marine and life insurance, embraces insurance against accidents or damage to plate-glass arising from causes other than fire.

One acting, therefore, within this State as the agent in receiving and procuring applications for insurance for such a company organized under the laws of another State, which company has not filed with the superintendent of the insurance department a certificate showing it to be possessed of the capital prescribed by said act (§ 14), is liable for the penalty imposed thereby. (§ 18.)

A recovery may also be had against such agent for the penalty imposed by the act of 1861 (chap. 334, Laws of 1861) upon the agent of a foreign

\* See Mem., 64 N. Y., 648.

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Statement of case.

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insurance company, in case of the failure of the company to file the annual statement required by that act.

The only effect of the act of 1873 (chap. 617, Laws of 1873), in relation to plate-glass insurance companies, was to reduce the amount of deposit required of such companies. It did not abrogate the penalties imposed by the said act of 1853.

To maintain an action to recover the penalty imposed by said act of 1853, it is not necessary to set forth the statute in the complaint; it is sufficient to state that the acts complained of were in violation of the insurance statutes of the State.

(Argued December 4, 1876; decided December 19, 1876.)

APPEAL from judgment of the General Term of the City Court of Brooklyn affirming a judgment in favor of plaintiffs, entered upon a verdict, and affirming an order denying a motion for a new trial.

This action is brought to recover penalties claimed in the complaint to have been incurred by the defendant, in acting as the agent of a foreign insurance company, in the issuing and delivery of insurance policies, "in violation of the insurance acts and statutes of this State." No particular statute was referred to.

The particular violation relied on was, that on the 27th day of June, 1873, the defendant, acting for the New Jersey Plate-glass Insurance Company, a corporation organized under the laws of the State of New Jersey, issued and delivered to the Phoenix Insurance Company of Brooklyn a policy of insurance of plate-glass in a building known as No. 98 Broadway, Brooklyn, the said New Jersey Plate-glass Insurance Company having failed to comply with the requirements of the insurance laws, and being therefore unauthorized to issue policies within this State.

Upon the trial defendant's counsel moved to dismiss the complaint on the ground that no statute was pleaded. The motion was denied and defendant's counsel duly excepted.

It was proved upon the trial that said company was incorporated in 1868 by an act of the legislature of the State of New Jersey for the purpose of insuring against loss or damage

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Opinion of the Court, per RAPALLO, J.

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by accidental breaking plate and other large glass or mirrors. No certificate of the deposit of securities, annual statements, or other documents whatever relating to the company, were on file in the office of the superintendent of the insurance department. The fact of the delivery by defendant of the policy, as alleged in the complaint, was proved, and also that defendant had an office in the city of Brooklyn bearing the sign "general agency of the New Jersey Plate-glass Insurance Company."

The court charged the jury that under the existing statutes in this State, the New Jersey Plate-glass Insurance Company "had no right to issue policies because it had not complied with the prerequisites which the statute had provided," and that if defendant acted as agent, plaintiffs were entitled to recover, to which defendant's counsel duly excepted.

The question whether the defendant was acting as the agent of the company was left to the jury.

Further facts appear in the opinion.

*D. P. Barnard* for the appellant.

*Henry E. Davies, Jr.*, for the respondents.

RAPALLO, J. We think that the provisions of chapter 463 of the Laws of 1853, as amended by chapter 300 of the Laws of 1862, and chapter 328 of the Laws of 1865, are sufficiently broad to sustain this action. Section 1 of that act provides for the incorporation of insurance companies, which are divided into two departments. The first to make insurance on lives, etc., and the second on health, against accidents to persons, on the fidelity of persons holding places of trust, on the lives of animals, and also "*against loss, damage or liability arising from any unknown or contingent event whatever which may be the subject of legal insurance,*" except fire, marine and life insurance.

This language is, in our judgment, sufficiently broad to embrace insurance against accidents or damage to plate glass, arising from causes other than fire. Such casualties are con-

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Opinion of the Court, per RAPALLO, J.

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tingent events, which may be the subject of legal insurance.

Section 6 of this act provides that no company organized for the purposes named in the second department shall commence business until it shall have deposited with the superintendent of the insurance department the sum of \$25,000, invested in certain prescribed securities. By chapter 328 of the laws of 1865 this amount is increased to \$100,000.

Section 14 enacts that it shall not be lawful for any person to act within this State, as agent or otherwise, in receiving or procuring applications for insurance, or in any manner to aid in transacting the business of insurance referred to in the first section, (which embraces both departments) for any company or association incorporated by or organized under the laws of any other State government, unless such company is possessed of the amount of capital required by the sixth section for companies in this State, invested in prescribed securities, which securities shall be deposited with the auditor, comptroller, or chief financial officer of the State by whose laws said company is incorporated, and the superintendent of the insurance department of this State is furnished with the certificate of such officer that he holds such securities in trust and on deposit for the benefit of policyholders, etc. Such companies are also required to file statements.

Section 18 enacts that every violation of the act shall subject the party violating to a penalty of \$500 for each violation, to be sued for and recovered in the name of the people by the district attorney of the county in which the company or agent so violating shall be situated.

The complaint avers that on or about the 27th of June, 1873, the defendant, in the city of Brooklyn, in this State, issued and delivered to the Phoenix Insurance Company a policy of insurance on plate glass, purporting to be issued by The New Jersey Plate Glass Insurance Company, and received the premium thereon; that said company was not organized under the laws of this State, and did not deposit security as required by the laws of this State, and was not authorized to

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issue policies within this State, and that said policy was issued in violation of the insurance acts and statutes of this State.

It was proved on the trial that the company was incorporated in 1868, by an act of the legislature of the State of New Jersey, for the purpose of making insurance against loss or damages by the accidental breaking of plate and other large glass, or mirrors. That no certificate of the deposit of securities, statement, or other document whatever relating to the company, was on file in the office of the superintendent of the insurance department. That the defendant had an office in the city of Brooklyn bearing the sign, "General Agency of the New Jersey Plate Glass Insurance Company." That on the application of the Phoenix Insurance Company, he delivered to it a policy of said Plate Glass Insurance Company, insuring the Phoenix Company against loss or damage by accident to certain plates of glass in Brooklyn, and received the premium of such insurance. The court charged the jury that, under the existing statutes of this State, the New Jersey Plate Glass Company had no right to issue policies, because it had not complied with the prerequisites which the statute had provided, and that if the defendant acted as their agent, the plaintiffs were entitled to recover the penalty. The question of the defendant's agency was left to the jury, who found for the plaintiffs.

We think that the plaintiffs' case was made out under the act of 1853 before referred to, and that the recovery may also be sustained under chapter 334 of the Laws of 1861, which requires all foreign insurance companies transacting any kind of insurance in this State, to make annual statements of their condition to the insurance department, in the same manner and in the same form as similar companies organized under the laws of this State, and subjects agents of such companies to penalties in case of omission. It is claimed, however, that as there was no law in this State expressly referring to plate glass insurance companies, no form of statement was prescribed for such companies, and this company could not, therefore, make a statement in the same form as similar companies

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Opinion of the Court, per RAPALLO, J.

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in this State. The act of 1853, however, prescribes a form of statement for companies organized under that act, and if we are right in holding that plate glass companies fall within its provisions, a penalty was incurred by the defendant, under the act of 1861, by reason of the failure to file a statement, as well as under the act of 1853, by reason of the failure to deposit securities and file the certificate.

The appellant contends that the first statute of this State in relation to plate glass companies is chapter 617 of the Laws of 1873, and that inasmuch as that act omits to provide any penalty for a failure to comply with its provisions, agents of such companies are free from any penalty. We cannot concur in this view. On the contrary, we think that the act of 1873 shows that the act of 1853 was regarded by the legislature as authorizing the formation of plate glass companies, and applicable to them, for the act of 1873 speaks of companies theretofore organized under the laws of this State, to make insurance against loss or damage to plate glass exclusively. The act of 1853 was the only one under which such companies could have been organized. The only effect of the act of 1873 was, in our opinion, to reduce the deposit required of plate glass companies, domestic or foreign, to \$50,000 in place of \$100,000, which was required of all casualty companies by the act of 1853 as amended in 1865, and it was not intended to abrogate the penalties imposed by that act.

The only objection raised at the trial to the reference to the act of 1853, for the purpose of maintaining this action, was that that act was not pleaded. We think that the case of *Nellis v. The New York Central Railroad Company* (30 N. Y., 505), fully answers that objection. No other question was raised in respect to the pleadings.

The judgment should be affirmed.

All concur.

Judgment affirmed.



## Statement of case.

THE PEOPLE ex rel. CHARLES BANKS et al., Respondents, v.  
JAMES B. COLGATE, Appellant.

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One S. being the owner of a tract of land on the east side of, and bounded on the west by, the Hudson river, caused a map thereof to be made and filed. On this map lots were laid down as abutting on the easterly side of North River street, a street represented as running along the shore of the river. The street was never opened or used by the public; and in front of one of the lots, numbered 61, the greater part of the street was below high-water mark. The grantees of S. conveyed lot 61, describing the western boundary as running along the easterly line of North River Street, and defendant became the owner by deed containing the same description. Defendant applied to the commissioners of the land office for a grant of the land under water in front of lot 61, representing in his application that he was the owner of the adjacent land. The application was granted and letters patent issued to him. In an action brought to vacate the grant, *held*, that it was made without authority, and was properly vacated (1 R. S., 208, § 67); that defendant was not the owner of the land adjacent to the river, but simply of an easement therein; and that only the owner of the fee was entitled to the grant.

(Argued December 4, 1876; decided December 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought by the attorney-general to vacate and annul certain letters patent of lands under water in the Hudson river, issued pursuant to a resolution of the commissioners of the land office, on the ground that it was executed under mistake, and in ignorance of material facts.

The facts are set forth sufficiently in the opinion.

*Charles Jones* for the appellant Defendant is the "adjacent owner" and "proprietor of the adjacent lands," within the meaning of the statute relating to grants of land under water. (1 R. S., 208, § 67; 1 id. [6th ed.], 602, § 82; *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y., 61; *Holden v. Trustees of Cold Spring*, 21 id., 474; *In re Lewis St.*, 2 Wend., 772; *In*

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Opinion of the Court, per ANDREWS, J.

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*re Thirty-ninth St.*, 1 Hill, 191; *People v. Mauran*, 5 Den., 389; *Morgan v. Livingston*, 6 Martin, 19; *Municipality v. Orleans Cotton Press*, 18 La., 123; *C. and O. Canal Co. v. Un. Bk.*, 5 Cranch, 509.) The relators are estopped from attacking the validity of the grant to defendant. (1 R. S., 208 [m. p.], § 70.)

*E. Ellery Anderson* for the respondents. The deed from Jones and Candee to Ross did not convey to him any interest in the land in North River street lying in front of lot 61. (*Wetmore v. Law*, 34 Barb., 515; *Van Amringe v. Barnett*, 8 Bos., 357; *Anderson v. James*, 4 Robt., 35; *Halsey v. McCormick*, 13 N. Y., 296; *Jackson v. Hathaway*, 15 J. R., 447; *Munn v. Worrall*, 53 N. Y., 44.) The relators' title to the strip of land is a fee absolutely free from any lien or easement whatever. (*Craig v. Rock City*, 39 N. Y., 404; *Higgins v. Reynolds*, 31 id., 151.)

ANDREWS, J. In 1852, one Simpson Sampson was the owner of a tract of land on the east side of the Hudson river, in the village of Yonkers. In March of that year he caused a map of the tract to be made and filed. On this map lots, among others lot 61, were laid down as abutting on the easterly side of North River street, a street represented on the map as twenty-nine feet wide, running easterly and westerly along the shore of the river. This street had no existence, except on the map. It has never been opened or used by the public, and in front of lot 61, by reason of the inward trend of the shore line of the river, the greater part of the street as laid down on the map was below high-water mark. The river was the western boundary of the Sampson tract, and only that part of North River street above high-water mark was covered by the Sampson title. The title to the bed of the river was in the State. The part of the street in front of lot 61 above high-water mark, consisted of a narrow and irregular strip of land on the easterly side, from three to eleven feet in width.

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Opinion of the Court, per ANDREWS, J.

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On the 4th day of May, 1852, Richard Jones and Edward W. Candee, who had acquired the title of Sampson to the whole tract, conveyed to one Ross, lot 61, as laid down on the map, the western boundary thereof being described in the deed to him as running along the easterly line of North River street, and the defendant on the 30th day of April, 1864, became the owner of lot 61 by deed, from the grantee of Ross, containing the same description. The defendant never had any right in the upland within the boundaries of North River street in front of lot 61, other than that he acquired by the deed to which we have referred. On the 19th day of March, 1853, Candee, who had acquired the interest of Jones in the Sampson tract, deeded to Joseph H. Jennings the upland within the boundaries of North River street, and he held it under this title at the time of the grant from the State, now to be mentioned.

In May, 1871, the defendant applied to the commissioners of the land office, for a grant of the land under water in the Hudson river in front of lot 61, and in his notice of application, which contained a description of the land to which the application related, he represented that he was the owner of the adjacent land. The commissioners of the land office granted the application, and on the 19th day of August, 1871, letters patent were issued to the defendant for the lands described in the application. This action was brought by the Attorney-General in the name of the people, to vacate, and avoid the grant to the defendant, on the ground that it was made under a mistake, and in ignorance of material facts. The relator was joined with the people as plaintiff, upon the allegation that he owned the land in North River street, adjacent to the land under water granted to the defendant.

Grants by the State of land under the waters of navigable rivers are regulated by statute, and the authority of the commissioners of the land office in respect to them is defined and limited. The statute provides as follows: "The commissioners of the land office shall have power to grant in perpetuity, or otherwise, so much of the lands under

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Opinion of the Court, per ANDREWS, J.

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the waters of navigable rivers or lakes, as they shall deem necessary to promote the commerce of this State, or proper for the purpose of beneficial enjoyment of the same by the adjacent owner; but no such grant shall be made to any person other than the proprietor of the adjacent lands, and any such grant that shall be made to any other persons shall be void." (1 Rev. Stat., page 208, § 67.) From the preceding statement of facts it appears that at the time the letters patent were issued to the defendant, he was the owner of lot 61 of the Sampson tract under a deed which bounded him on the west by the east line of North River street, and that Jennings had title to the upland in North River street between lot 61 and the river. The statute expressly prohibits the commissioners of the land office from making any grant of lands under water, except to the owner and proprietor of the adjacent lands, and avoids any such grant to any other person.

The defendant was not the owner or proprietor of the land adjacent to the river in front of lot 61. The deeds under which he derived title to lot 61, by express and definite language, made the east side of North River street the west boundary of the lot, and by necessary inference North River street was excluded from the conveyance. The soil and freehold of the upland in the street was in Jennings, subject to the easement of a right of way in favor of the owners of lot 61. This easement was not an estate in the land, but an incorporeal right annexed to the lot of the defendant and constituting a burden or servitude upon the land of Jennings, included within the street. The owner does not divest himself of the fee of his lands by dedicating them as a way. The fee remains in him, with the exclusive right of enjoyment and use, not inconsistent with the dedication, and as owner of the freehold he may maintain trespass, ejectment, or waste. (*Jackson v. Stone*, 13 J. R., 447; *Childs v. Starr*, 4 Hill, 369.) So, also, the owner of land, upon which there is a way or street, may, on a sale of the land, reserve the way from the conveyance, and if this clearly appears from the language of the deed to have been the intention of the

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Statement of case.

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parties, there is no objection in law to giving it effect. (*Jackson v. Stone*.) It is clear that the defendant was not entitled to a grant from the State of the lands under water, embraced in his patent. It is not material upon the question of the validity of the patent, that but a few feet of land separated his lot from the shore of the river. The owners of the tract carefully defined the boundaries of the lots conveyed, so as to retain the title to the land in the street, and it may have been for the very purpose of subsequently securing to themselves, by grant from the State, the lands under water for the erection of docks or other valuable uses. The judgment in this case vacated the letters patent as to the land under water in front of lot 61. It did not adjudge the title of the upland to be in the relator. The averment of title in Banks was immaterial. The grant to the defendant was void whether Jennings or Banks owned the upland. It appears, however, that Banks acquired the title before the commencement of the action.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. THE GALLATIN NATIONAL BANK et al., Appellants, v. THE COMMISSIONERS OF TAXES AND ASSESSMENTS, Respondents.

Under the provisions of the act of 1866 (chap. 761, Laws of 1866), "authorizing the taxation of the stockholders of banks," etc., the actual, and not the par, value of the shares of the capital stock of national banks is the basis of assessment and taxation.

It is the duty of assessors to ascertain the actual value of the shares held by a stockholder, and, after deducting their proportion of the value of the real estate owned by the bank, the balance is the proper sum to be assessed,

The act of 1865 (chap. 97, Laws of 1865), authorizing State banks to become national banks, did not give to a bank availing itself of the privilege a contract that its shares should not be assessed for more than their par value.

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Said act, so far as it provides for the taxation of national banks, having been declared unconstitutional and void by the United States Courts (*Van Allen v. The Assessors*, 3 Wall., 573; *People v. Comrs.*, 4 id., 244), if a contract was intended, the intent failed, and could not affect future legislation.

The fact that State banks can divide up their surplus, while national banks are required to keep on hand a portion of theirs, does not make the mode of assessment and taxation prescribed by the act of 1865 unjustly to discriminate against the latter.

The legislature, therefore, by the enactment of said provision of the act of 1866, did not interfere with any of the constitutional rights of a bank which, under the provisions of said act of 1865, was converted from a State into a national bank.

(Argued December 5, 1876; decided December 19, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department affirming the proceedings of the commissioners of taxes and assessments, in the city and county of New York, in assessing the shareholders of the relator, the Gallatin National Bank, upon their stock in said bank, and dismissing a writ of *certiorari* brought to review such proceedings. (Reported below, 8 Hun, 536.)

The said bank was first incorporated under the general banking law of this State. In pursuance of the provisions of chapter 97, Laws of 1865, it was converted into a national bank. The par value of the shares of its capital stock is fifty dollars. The said commissioners assessed the value at seventy-two dollars and two cents. The relators appeared and opposed the assessment; the president of the bank making affidavit that the actual value of the shares was but sixty-four dollars. The commissioners thereupon assumed this as the value, deducted five dollars per share as the proportion of the value of the real estate belonging to the bank, and reduced their assessment to fifty-nine dollars per share.

Further facts appear in the opinion.

*D. D. Lord* for the appellants. The repeal in chapter 761, Laws of 1866, of section 10 of chapter 97, Laws of 1865, was unconstitutional, as affecting the validity of a contract

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Opinion of the Court, per EARL, J.

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between the relators and the States. (*Cent. B. and B. Co. v. Georgia*, 20 How., 665.) The assessment was illegal, the valuation being, in reality, a taxation of the capital of the bank. (2 Wall., 200; 3 id., 573; 4 id., 244.)

*Hugh L. Cole* for the respondents. The actual, and not the par, value, where the two do not coincide, is the standard to be adopted by the commissioners in assessing the value of shares of the capital stock of a national bank upon the stockholders thereof. (2 Laws of 1866, chap. 771, p. 1647; 1 R. S., 393, § 17.) The stockholders cannot avoid taxation on the actual value of their stock because a part, or even the whole, of the capital stock of the bank is invested in United States bonds. (*Van Allen v. The Assessors*, 3 Wall., 573; *People v. The Comrs.*, 4 id., 244.)

EARL, J. The relators complain that the defendants have assessed the shares in the bank at their actual value instead of their par value, and claim that this mode of assessment is erroneous.

The act of congress in reference to the organization of national banks was passed June 3, 1864. It conferred certain privileges upon the banks to be organized and regulated the mode in which they should do their business and the terms upon which they should enjoy the important privilege of issuing and circulating notes. It also provided how State banks could be converted into national banks, and that the taxation of the shares of national banks should not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens or is imposed upon the shares in any of the State banks in the same State.

In 1865 (chap. 97) the legislature passed an act to enable State banks to avail themselves of the act of congress and become national banks, and prescribed the mode in which State banks could be converted into national banks; and for the purpose of bringing our statutes as to taxation into harmony with the requirement of the act of congress, section 10

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Opinion of the Court, per EARL, J.

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provided that all the shares in both State and national banks should be included in the valuation of the personal property of the share owners, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State, provided that the tax so imposed upon such shares shall not exceed the par value thereof."

The Gallatin National Bank was, prior to 1864, a State bank and it was converted into a national bank under the act of congress and the act of 1865 above referred to.

The first claim made by the relators in this action is that the act of 1865 gave them a contract that the shares in the bank should not be assessed for more than their par value. A complete answer to this claim is, that the act, so far as it provided for the taxation of national banks, has been declared unconstitutional and void. (*Van Allen v. The Assessors*, 3 Wall., 573; *The People v. The Commissioners*, 4 id., 244.) Hence, if the legislature attempted to make a contract it failed, and a void law certainly could not deprive future legislatures of the right to exercise all their powers on the subject of taxation of banks. But the act does not purport to make a contract; it simply enabled State banks to become national banks and provided by a general law how the bank shares should be taxed. This law the legislature could alter, and it was deprived of none of its rightful power over the subject of taxation. It is never to be assumed that the State has, by any act, fettered its power of taxation in the future, unless it appears with irresistible clearness that the enactment was intended to be in the nature of a private contract as distinguished from a mere act of general legislation. (*The People v. Roper*, 35 N. Y., 629; *The People v. The Commissioners, etc.*, 47 id., 501; *Rector, etc., of Christ Church v. County of Philadelphia*, 24 How. [U. S.], 300.) The legislature did not, therefore, interfere with any of the constitutional rights of the relators when it enacted, by section 1 of chapter 761 of the Laws of 1866 (p. 1647), "that no tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State or of the United States, but



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the stockholders in such banks or banking associations shall be assessed and taxed on the value of their shares of stock therein.”

The assessors in the discharge of their duties under this act must ascertain the value of shares in banks, and to that end they must take into consideration every thing that gives value to shares — the surplus and the circumstances under which it exists, the franchises and advantages and disadvantages of the banks and all the other circumstances, and when they thus ascertain the value of the shares, such value is to be the basis of assessment and taxation.

It appears in this case that the defendants assessed the shares in the bank at the value as required by the statute. The par value of the shares is fifty dollars, and in the first place the defendants assessed each share at seventy-two dollars and two cents. The relators subsequently appeared before the defendants to complain of the assessment and have it reduced; and the utmost they claimed as to the value of their shares was that it did not exceed sixty-four dollars per share, and the defendants then reduced their assessment to fifty-nine dollars per share — the value on a basis of sixty-four dollars per share after deducting the value of real estate owned by the bank.

This system of taxing bank shares is in entire harmony with that of taxing other personal property. The Revised Statutes (1 R. S. 393, § 17) provide that all personal estate “shall be estimated and assessed by the assessors at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor.” This provision requires the assessment to be for the “full and true value,” and then, that there may be no mistake or evasion of this duty it provides a guide, which will in all cases give the full value — to wit: what the same would be worth in the payment of a just debt to a creditor entitled to and able to procure the cash for his debt. The basis of assessment is really the cash value. As I understand it, such was the assessment which is complained of in this case.

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Statement of case

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It is, however, further claimed that there is an unjust discrimination against national banks, because State banks can divide up all their surplus and national banks are required to keep on hand and accumulate a portion of their surplus. I cannot perceive the force of this claim. If a State bank divides up its surplus, it has not got it to use, and it may be taxed in some form in the hands of the shareholders who have received it. While a national bank is required to keep some of its surplus and to deposit a certain portion of its capital, in bonds, with the comptroller of the currency, it can, in certain ways, use its surplus; and it receives interest upon its bonds so deposited, and it has the advantage of a circulation of notes and all the other advantages which the laws of congress give such banks. Who shall say that a national bank is at any disadvantage as compared with State banks? It is generally supposed that they have a substantial advantage over the latter. But however that may be, all these circumstances were before the defendants when they fixed the value of the shares, and as long as they did not take an improper basis or violate any law, we cannot interfere with their determination. In accordance with these views are the cases of *People v. The Assessors of Albany* (2 Hun, 583), and *Hepburn v. The School Directors* (23 Wallace, 480).

Having given careful consideration to all the views urged upon us by the learned counsel for the relators, we have reached the conclusion that the judgment must be affirmed.

All concur.

Judgment affirmed.

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THE PEOPLE ex rel. JOHN J. HEALY, Respondents, v. HENRY J. LEASK, Appellant.

Both by the special statute, (chap. 217, Laws of 1866), and the general statutes, (chap. 514, Laws of 1851; chap. 344, Laws of 1857), relating to the term of office of the clerk of the Eighth District Court of the city of New York, such term is for a period of six years, and is not dependent upon the expiration of the term of office of the justice of said court.

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The act of 1872, (§ 1, chap. 438, Laws of 1872), changed the provisions of the act of 1866 by providing another appointing power and by fixing the time of appointment and the commencement of the new term (*i. e.*, immediately after the passage of the act); but it left untouched the duration of the term.

Accordingly, *held*, that the relator, who was appointed clerk of said court by the then justice thereof in May, 1872 (after the passage and in pursuance of said act of 1872), was entitled to a term of six years; and could not be removed before the expiration thereof by the justice succeeding the one who made the appointment.

(Argued December 5, 1876; decided December 19, 1876.)

APPEAL from order of the General Term of the Court of Common Pleas of the city and county of New York setting aside a verdict and granting a new trial.

This action was in the nature of a *quo warranto* to try the title to the office of clerk of the Eighth District Court of the city of New York.

Healey, the relator, was appointed clerk of said court May 20, 1872, by the justice for the district, under the provisions of chapter 438, Laws of 1872. The term of office of the justice expired December 31, 1875, and the new incumbent on January 1, 1876, appointed defendant as clerk, who thereupon took the office and excluded the relator therefrom. The court, on trial, directed a verdict for defendant, to which plaintiff's counsel duly excepted. Exceptions were ordered to be heard at first instance at General Term.

*George Bliss* and *Roscoe H. Channing* for the appellant. Chapter 438, Laws of 1872, provided only for a change in the manner of appointing the clerks of the several district courts. (*Hogan v. Flynn*, 62 N. Y., 375.) Their terms of office are coterminous with that of the justice. (Laws of 1851, chap. 514; *People v. Batcheler*, 22 N. Y., 143; Laws 1866, chap. 217, p. 471; *People v. Suprs. of N. Y.*, 11 Abb. Pr., 115.)

*Nelson J. Waterbury* for the respondents. The justice has no power to remove the clerk. (*People v. Flynn*, 62 N. Y.,

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375.) The term of office of the clerk as prescribed by law is six years. (Laws 1848, chap. 153; Laws 1851, chap. 147; id., chap. 514; Laws 1854, chap. 65; Laws 1855, chap. 293; Laws 1857, chap. 344; Laws 1866, chap. 217; Laws 1869, chap. 377.)

FOLGER, J. By an act of 1872, (Laws of 1872, p. 1031, chap. 438, § 1), it was provided that there should be a clerk in each of the district courts of the city of New York. The power of appointment of the clerk of each court was, by the same act, given to the justice of each court; (*People ex rel. Hogan v. Flynn*, 62 N. Y., 375.) The person appointed was to take office immediately after his appointment; and the term of office of him who was then an incumbent was thereupon to cease. The new incumbent was, by the act, to hold office as was prescribed by law at the passage of that act.

When this act was passed, William J. Kane was justice of the Eighth District Court. Soon after the passage of the act, he appointed Healey, the relator, to the office of clerk of that court; and Healey entered into it, and was entitled to remain in it for the term prescribed by law.

The laws which were then in existence prescribing that term were of two kinds. There was one act relating especially to this Eighth District Court, and to the clerk of it. There were other acts relating to all the district courts, and to all the clerks of them. First, of the especial act. In 1866 an act was passed relating to the office of clerk of the Eighth District Court. (Laws of 1866, p. 471, chap. 217, § 3.) It provided that the board of supervisors of New York, before the 1st day of January, 1870, should appoint a clerk of that court, who should hold his office for the term of six years from that day. It further provided that once in every six years thereafter, that board should appoint in like manner for the term of six years. This provision of that act is not affected by the adjudications, in *The People ex rel. Loew v. Batchelor* (22 N. Y., 138), and in *The People ex rel. Hill v. Bull* (46 id., 57). The act of 1872, above cited, changed this

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section of the act of 1866, only in providing another appointing power, and in the time for the commencement of the term of office of the appointee. The justice of the district court of the eighth district is created the appointing power, and the term of the appointee is to commence immediately after the appointment, but the appointee is to hold office as then prescribed by law, that is, for the term of six years prescribed by the act of 1866. It is claimed that this third section is still in force in all things, except as to the appointing power, and that the present justice (GEDNEY), of the eighth district, was obliged, in the period of six years from the 1st day of January, 1870, to appoint a clerk for a term of six years. This is not so. The act of 1872 changed the appointing power, and by implication, also fixed the time for the appointment to be made during that period of six years. It thus fixed that time to be at once after the passage of the act; and by declaring that the term of the clerk then in office should cease at once upon a new appointment, it fixed the commencement of the new term. But it left untouched the duration of the new term, which the act of 1866 declared should be for six years. And when Healey was appointed in 1872, a new period of six years was begun, sometime during which another appointment must be made for a new term of six years. But no appointment could be made under that act during that six years, which would deprive him of his office until his term of six years was ended; that is to say, there could not be two appointments during the same term of six years, each to take effect during that term.

Second, as to the general acts. In 1857 an act was passed, (Laws of 1857, chap. 344, pp. 707, 726, § 71), providing that the clerks of these district courts should be appointed, and should hold their offices, in the manner then provided by law. There was a special provision as to the length of term of office of the clerks first appointed under that act; but as it has, by efflux of time, ceased to operate, it does not directly affect the question in hand. The provisions of law which were in force when the act of 1857 above cited was passed, are to be found

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in the act of 1851. (Laws of 1851, chap. 514, p. 957, § 7.) By that it was provided that the clerks of those courts, thereafter appointed, should enter upon the performance of their duties at the same time, and should hold their offices for the same period, as the justices to be elected under that act. That period was fixed by that act, for the first term thereafter, to be from the second Tuesday of May, 1852, until the 31st December, 1857, and the terms after that to be for six years. It is said that it has been the obvious and continued policy of the laws, that the term of office of the clerks should expire, when the term of office of the justices expired. It is not the fact that the laws have always so provided. The act of 1851, (chap. 147, p. 271), provided for the filling of vacancies in the office of clerk, whether by expiration of term or otherwise, and fixed the term of the appointee to fill the vacancy at the full length of four years, without regard to the term of the justice. (See also act of 1857 [*supra*], as to vacancies, and laws of 1848, pp. 249, 250.) But if it were as claimed, we see no indication that the lawmaker meant that the clerks should retire at the end of six years, because the justices then ended their term. When the law refers to the term of the justices as the term for the clerks, it does not mean to fix the latter officers to the former officers, so that the latter must follow the former, whatever change from natural cause, or from legislation, or from personal conduct, should take place with either class, or any of the members of it. It meant to establish an absolute term, as well for the office of clerk as for the office of justice. The first term, provided for by the act of 1851, is limited by certain dates for its beginning and its ending; but after that the term is measured by the lapse of a period of time, not fixed by dates, but measured by the space of six years. We consider the words "for the same period," used by the act of 1854, in fixing the term of office of the clerks, to be but another expression, for the phrase "for six years," so far as the terms of office after 31st December, 1857, are concerned. No reason then existed for making the clerk dependent upon the justice. The

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power of appointment was with the mayor and the board of aldermen. (Laws of 1851, chap. 147, p. 271, § 3.) The justice must accept as the clerk of the court, whomsoever the appointing power put into that office, whether personally acceptable or not. No intention is evident in the acts, that if the incumbent of the office of justice should die, or resign, or be removed, and thus his term come to an end, that the term of the clerk should end also. The phrase "for the same period," refers back to the space of time as previously specified, viz. : "for six years," and does not mean to convey the idea of cessation, whenever, for any reason affecting the justice only, his term should cease. So far as that act declared and foresaw, the justices to be elected under it, would hold offices for six years; that was the rule of the law. They were to be elected once in every six years, and their term of office should be for six years. If, with any justice it should turn out otherwise, that was unintended, and would be a casual exception, not to affect the clerk of the court of that justice, any more than the clerks of the courts of the other justices. The act speaks of the clerks collectively, and of the justices collectively, and of the term of office of each class as of the same duration in number of years. It refers to the term of office of the justices as a class, as a measure of the term of office of the clerks as a class. Neither class was to be affected in the duration of its term of office, by any circumstance altering the term of office of the other class, nor was any member of either class to be so affected. In construing this, as any other statute, we must take the rule prescribed by the law giver as the expression of his final purpose. We cannot gather from this act then, that the legislature had in view or intention a subsequent change in the mode of appointment of the clerks, or a change in the beginning of the term of office of the justices, or of the clerks. It was by that act settled that that term should be for six years. It was declared that the justices elected under that act should have a term of office for six years. Having thus declared that the justices elected under it should have a term of office for six years, it then

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declared that the clerks thereafter appointed, should hold their office for the same period as the justices to be elected under it. For what period were the justices to be elected, in the purpose and contemplation of the act, to hold their offices? Why, for a period of six years, the term of time named in the act; not for any other term of time, which might be created by accidental or unforeseen circumstances affecting the justices, all or any of them, and changing the length of term for which they should hold. So the act of 1855 (chapter 293, p. 502) declared that the term of office of the Police Court clerks should be the same as that of the clerks of the district courts, evidently meaning a term of the same number of years, and not a term which should end upon the ending of the term of the district court clerks from any unanticipated cause, legislative or otherwise. And here falls the most plausible position of the appellant. He claims that the law always made the term of office of justice and clerk coterminous, and hence intended that the clerks should go out when the justice went out; and further, so that the justice should have a clerk personally acceptable to him. The law at best gave him the power of appointment of a clerk, and made the term of office of the clerk expire with that of his patron, so that the incoming justice could also make a clerk agreeable to himself. But this reason does not hold good when applied to the act of 1855 fixing the term of office of clerks of Police Courts. Their term is declared to be the same as that of the clerks of the district courts. Do they end whenever the terms of the justices of the district courts end? What reason of personal acceptability applies here? None. And it is evident that the term of the clerks of district courts is referred to merely as a measure of time, and so in the case of those latter clerks, is the term of the justices referred to as only a measure of time. Clearly, then, the clerks were to hold for a period of six years? The word *period*, in its proper meaning, has reference to a lapse of time; and the statute in the use of it, had reference to a lapse of time, as measured by the measures of time in use among men. It did not have reference to persons, as



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indicating that the lapse of time designated should be measured by any thing relating, or to relate, especially to them, further than that, as in speaking of them, a certain measure or length of time had been named, it was deemed convenient and intelligible to speak of that term in connection with them as being a length of time already fixed and definite. A period of time is a stated and recurring interval of time, a round or series of years, by which time is measured. When the statute prescribed the term of office of the clerks to be, in general phrase, for the same period, it referred to the stated and recurring interval of time, to the round of series of years which it had already named, to wit, six years.

There are other statutes in *pari materia*, which show the legislative purpose to fix a definite term of years, as the duration of the tenure of office of the clerks. (1848, chapter 1853, p. 249; 1851, chapter 147, p. 271; 1860, chapter 300, p. 519.) The case in 62 New York (*supra*), as far it goes, is in harmony with these views. *The People ex rel. v. Lane* (55 N.Y., 49), does not conflict with them.

We are brought to the conclusion, both by the especial and general statutes relating to the term of office of the clerk of the eighth district court, that the relator, when he was appointed thereto by Justice KANE, entered upon, and was entitled to, a term of six years. From that he has been expelled and shut out.

The judgment in his favor should be affirmed.

All concur.

Judgment affirmed.

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WILLIAM E. HASSAN et al., Appellants, v. THE CITY OF ROCHESTER et al., Respondents.

The legislature has power to authorize the lands of the State to be assessed for local improvements.

The provision of the Revised Statutes (1 R. S., 387, § 1) exempting from taxation lands belonging to the State relates to general, county and State taxes; it has no reference to assessments for improvements, made under special laws and of a local character.

67	528
122	936
87	528
130	406
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139	139

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The provision of the charter of the city of Rochester of 1861 (chap. 143, Laws of 1861), providing that property which is exempted from taxation by the general laws of the State may be assessed and taxed for local improvements, includes lands of the State, and removed as far as such lands situate in said city are concerned, any exemption then existing by statute or otherwise.

Under the provisions of said charter the common council of the city, by ordinance, ordered one tier of lots on each side of Oak street, within certain limits, to be assessed for a local improvement. The assessors omitted certain lots belonging to the State within the prescribed limits, and imposed the whole assessment upon the owners of other lots. In an action, by said owners, to restrain the collection of the assessment, *held*, that the assessment was illegal and void, and the action was maintainable; that the assessors, in failing to comply with the ordinance and with the requirements of the statute, did not act judicially; and that their decision could be reviewed collaterally.

In the absence of proof it will not be assumed in such case that plaintiffs' taxes will only be increased to an amount so trifling that the court will not interfere; the presumption is the other way.

Plaintiffs were not bound to offer to pay their proportion of the assessment.

Nor was it necessary to prove on the trial that the property omitted was benefited by the improvement. The common council, in passing the ordinance prescribing the territory to be assessed, adjudged that all parts thereof were benefited, and bound the assessors to assume that the lands omitted derived some benefit; and on that assumption it should have been assessed.

A confirmation of the assessment by the common council, after notice, did not preclude plaintiffs from the equitable relief sought. The provisions of the charter relating to the confirmation of assessments (§§ 197-199) vest no authority in the common council to confirm an assessment made in violation of an ordinance.

(Argued December 6, 1876; decided December 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department affirming a judgment entered upon a decision of the court at Special Term.

This action was brought to restrain the collection of an assessment imposed upon plaintiffs' lands for the improvement of Oak street, in the city of Rochester.

The decision upon a former appeal is reported in 65 N. Y., 516.

An ordinance was passed by the common council of said  
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city in May, 1865, directing the improvement of Oak street, the expense thereof to be defrayed by the owners and occupants of the houses and lands to be benefited thereby, and stating that "the portion of the city which said common council deem will be benefited by said improvements is described as follows: One tier of lots on each side of Oak street, from Allen street to Lyell street."

On one side of Oak street, within the prescribed limits, was a strip of land belonging to the State. This strip the assessors did not assess upon the ground that, it being the property of the State, was not subject to taxation. The assessment was confirmed by the common council. The trial court held that the decision of the assessors was correct, and directed a dismissal of the complaint.

*Geo. F. Danforth* for the appellants. The allegation in the answer that the land omitted was the land of the State constituted no defence. (*Doughty v. Hope*, 3 Den., 594; 1 N. Y., 79; *Thompson v. Barbours*, 61 id., 65; *Sharp v. Speir*, 4 Hill, 76; *People v. Mayor of Syracuse*, 2 Hun, 433, 435; *Clark v. Newton*, 3 Lans., 484; *Westfall v. Preston*, 49 N. Y., 349, 353, 355; *In re pet. Douglas*, 46 id., 42; *In re N. Y. P. E. Pub. School*, 47 id., 557; *In re Turpler*, 44 Barb., 46.) Defendants' case is not strengthened by the fact that the common council confirmed the assessment. (*Joyner v. Inhabitants*, 3 Carey, 567; *Chapman v. City of Bklyn.*, 40 N. Y., 372; *Arude v. Wheeler*, 48 id., 496; *Ireland v. City of Rochester*, 51 Barb., 414.) If the property omitted was the property of the State, it was liable to taxation for local improvements. (1 R. S., 360, § 1; *Mayor of Troy v. Mut. Bk.*, 20 N. Y., 390; *Am. Tr. Co. v. Buffalo*, id., note; 23 Barb., 272; *In re Mayor of N. Y.*, 11 J. R., 77; *Sharp v. Speir*, 4 Hill, 76; *People v. Mayor*, 4 N. Y., 419; *Harlem Presb. Ch. v. Mayor*, 5 Hun, 443; *People v. Mayor*, 2 id., 433; Laws 1869, chap. 273, § 83, p. 545; Laws 1876, chap. 419; 6 Opinions Attorney-General, 262, 268, 269; *Ex parte Lange*, 18 Wal., 200; *Bleecker v. Ballou*, 3 Wend., 263;

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*Ohegaray v. Jenkins*, 3 Sandf., 409; *People v. Roper*, 35 N. Y., 629; *Buffalo City Cemetery v. Buffalo*, 46 id., 506; *People v. Dayton*, 55 id., 378.) The assessment might have been to the occupant. (1 R. S., 389, §§ 1, 82; *People v. Cassidy*, 46 N. Y., 50.) The plaintiffs are entitled to relief in equity. (*Hopward v. City of Buffalo*, 14 N. Y., 534; *Susquehanna Bd. Suprs. v. Broome County*, 25 id., 312; *Allen v. City of Buffalo*, 39 id., 386; *Newell v. Wheeler*, 48 id., 491; *Ireland v. City of Rochester*, 51 Barb., 414.)

*James Breck Perkins* for the respondents. The omission of certain property from the assessment roll would not authorize the court to enjoin the collection of the assessment. (*Swift v. Poughkeepsie*, 37 N. Y., 511; *Barhydt v. Shepard*, 35 id., 238; *People v. Assrs. of Albany*, 4 id., 154; *People v. Assrs. of Bklyn.*, 39 id., 81.) The land exempted being land of the State, was not subject to taxation. (1 R. S., 226, § 52; id., 218, §§ 4-8; id., 360, § 4; 3 Edm. Stat., 155, § 6; Hilliard on Taxation, chap. 5, p. 141, § 4; *U. S. v. R. R. Co.*, 17 Wal., 322; *A. & A. on Corp.*, § 8; *Collector v. Day*, 11 Wal., 113; *Rundell v. Lakey*, 40 N. Y., 513, 517; *Mayor v. Bk. of Tennessee*, 1 Swan., 269, 271; *High v. Shoemaker*, 22 Cal., 363; *People v. McCreery*, 34 id., 433; *Doyle v. Austin*, 47 id., 353; *Inhabitants of Worcester County v. Mayor*, 116 Mass., 193; *People v. Doe*, 36 Cal., 220; *Piper v. Singer*, 4 S. & R. [Penn.], 354; *Buffalo City Cemetery v. Buffalo*, 40 N. Y., 506; *Mayor v. Cemetery*, 7 Md., 517; *Coster v. Mayor of Albany*, 43 N. Y., 408.) Plaintiffs are not entitled to relief in equity. (*Williams v. School District*, 21 Pick., 75, 81; *Ins. Co. v. Yard*, 19 Penn., 331; *State v. Collector*, 4 Zab. [N. J.], 108; *Page v. St. Louis*, 20 Mo., 136; *Bond v. City of Kenosha*, 17 Wis., 284; *Merrill v. Humphrey*, 24 Mich., 170; *Morrison v. Hershire*, 32 Iowa, 271; *Mills v. Johnson*, 17 Wis., 598; *R. R. Co. v. Morris*, 7 Kan., 215; *High on Injunctions*, 203, §§ 363, 364.)

MILLER, J. When this case was heard before the Commission of Appeals upon appeal from the judgment dismiss-

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ing the complaint, it was decided that by the charter of the city of Rochester the common council were to determine what portion of the city was to be benefited by the ordinance to improve Oak street, and declare whether the whole or what portion of the expense incurred should be assessed within the territory which they deemed benefited, and that the direction which they gave to the assessors, as provided by the charter, imposed upon these officers the duty to make such assessment upon all the owners and occupants in proportion to the advantage which each should be deemed to acquire by the improvement. It was also decided that the assessors had no authority to reverse or modify the decision of the common council in reference to the territory which would be benefited, and it was conclusive upon them. In view of what has already been determined, it remains to be considered whether the omission by the assessors to comply with the provisions of the charter and the ordinance of the common council, by including in their assessment, the lands which belonged to the State, under the circumstances, entitled the plaintiffs to the interposition of the power of a court of equity and to relief by enjoining the defendants. There is no contradiction of any of the material allegations in the complaint, and the pleadings concede that the ordinance was not complied with, and that the assessors omitted several hundred feet of frontage on Oak street, within the territory to be assessed, from any assessment. The proof sustains this fact, and, in addition, establishes that this property belonged to the State. We think that the action of the assessors was without authority, and that the lands belonging to the State should have been assessed, and were not entitled to exemption. This is clearly manifest from an examination of the statutes which relate to the subject, as well as the decisions in reference to questions partaking of the same general character. The Revised Statutes, chapter 13 of part 1, entitled "of the assessment and collection of taxes," comprehend a general system for the regulation of taxation in this State and the imposition and payment of taxes assessed. The first section of the

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chapter cited provides that all lands and personal property within the State shall be liable to taxation, "subject to the exemptions hereinafter specified." (1 R. S., 387, § 1.) The fourth section declares what property shall be exempt from taxation, and the second subdivision enumerates among the exemptions "all lands belonging to the State or the United States." The exemption thus stated evidently relates to general county and State taxes, and has no reference to assessments for improvements made under special laws and of a local character. (*Mayor of Troy v. Mutual Bank*, 20 N. Y., 390; *Am. Tr. Co. v. The City of Buffalo*, id., note; *People v. The Mayor of Brooklyn*, 4 id., 419.)

A manifest distinction exists between taxes and assessments which is distinctly recognized in the decisions. And it is held that an assessment is not a tax in many of the reported cases. (*Sharp v. Spier*, 4 Hill, 76; *Bleecker v. Ballou*, 3 Wend., 263; *Matter of the Mayor of New York*, 11 Johns., 77; *People v. Mayor*, *supra*, 432.)

In *Sharp v. Spier* (*supra*), this distinction is thus stated by BRONSON, J.: "Our laws have made a plain distinction between *taxes*, which are burdens or charges imposed upon persons or property, to raise money for public purposes, and assessments for city and village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement." The collection and enforcement of assessments made for local improvements has never been the subject of general regulation by statute, and there is no provision which exempts the property of the State from liability for such assessments. Not being excepted by the statute law of the State, it is left for the legislature, which is vested with ample power for that purpose, to make such enactments on the subject as may be considered needful and proper. While then it may be conceded that property belonging to the State, is not the subject of taxation, in the absence of any exemption by statute, it by no means follows that it is not liable to assessments for local improvements.

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The legislature clearly has the right by positive enactment to declare that such property may be assessed for local improvements, and we think it has done so in reference to the city of Rochester. The charter under which the ordinance for the improvement of Oak street was enacted (chap. 143, Sess. Laws of 1861, § 86) provides, that all sums to be raised by the common council shall be assessed upon all real and personal estate in the said city, but that no property which shall be exempt from taxation by the general laws of the State, shall be liable to be assessed for the ordinary city or county taxes, "but may be assessed and taxed for local improvements; but public squares and parks of said city which shall not be liable to be assessed for any purpose." This provision includes the lands of the State, and even if there had been any exemption by statute or otherwise, that exemption is removed by statutory enactment. It will be seen that the section of the charter cited is broad and comprehensive in its terms, and there is no ground for claiming that this provision was intended to apply only to property of churches, schools or other institutions, which this statute exempts from ordinary taxes. The statute appears to have carried out the distinction which, as already shown, is held to exist between a general tax and assessments for local improvements. Section 199 of the charter, which authorizes an action to recover an assessment, is not in conflict with the interpretation given, for although the State could not be sued as an individual, and the same remedy must be pursued as in other cases where a demand is made against the State, it does not change the character of the enactment or render it of no avail. This construction is also supported by subsequent legislation on the subject of assessments, and a similar provision will be found in the charter of the city of Auburn. (Sess. Laws of 1869, vol. 1, p. 545, § 83.) And a subsequent act (Sess. Laws of 1876, chap. 419) provides for the payment of an assessment made under the charter of that city. The reports of public officials to the legislature, also show the payment of numerous assessments of a similar character, and the Session Laws, for a series of years, down to the present time, make

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provision for the same, thus giving a legislative construction to enactments of this character. This practical construction continued for a long period of time, is entitled to great weight in the interpretation of a statute unless the legislation and practice is manifestly in violation of the words used, and has almost the force of a judicial exposition. (*People v. Dayton*, 55 N. Y., 398.) In *The Matter of the Mayor of New York* (*supra*), it was held that churches, which were exempt from taxation under the act of 1801, were not exempted from assessments for local improvements. The same rule would render the property of the State liable for such assessments. As these are considered under the decisions as benefits to the property assessed, increasing its value, and not as a tax, no valid reason exists why the State, any more than individuals, should be exempted from paying for the advantages conferred. A different rule would compel individual lot owners to pay assessments levied for improvements which were a benefit to the State lands without any adequate advantage, and in many instances impose a burden which would be extremely onerous and produce great injustice. This could not have been intended. Although the State cannot be made a party to an action to enforce such a claim and be sued in its sovereign capacity it may be assumed that the State will provide means for the liquidation of assessments imposed by virtue of laws enacted by its legislature, and that as has been frequently done heretofore, appropriations will be made for that purpose. As we have seen, the State has practically recognized its liability to municipal corporations for assessments imposed, and those who are to be benefited by the assessments of its lands have, at least, a right to the advantage which may be derived from the probable and perhaps certain payment of the same. We have been referred to some authorities bearing upon the subject of the liability of the State for assessments for its lands, but none of them, we think, conflict with the principle that the State, through its legislative power, may authorize its lands to be assessed for local improvements.



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The assessments being made in violation of law, it remains to examine some other objections urged by the defendant's counsel.

It is said that the duties of the assessors are of a judicial nature, and that their determination cannot be reviewed. This is true to a limited extent in regard to some of the powers conferred upon them; and they act thus in reference to the amount to be assessed against each owner and occupant, for this is for the assessors to determine; but it is otherwise as to the exclusion of territory which is covered by the ordinance; and when these officers fail to follow the obvious requirements of the statute, the rule stated has no application. The court so held in the former appeal, and that decision is conclusive on this point. The last remark will also apply to the position taken, that their decision cannot be reviewed collaterally. The cases which sustain a contrary doctrine are not in point where assessors have not followed the statutes under which they are acting. And the decisions are numerous which bring this case directly within recognized principles of equity jurisprudence. It has long been held, and is a well-settled rule, that a court of equity will entertain an action where it is necessary to prevent a multiplicity of suits, or irreparable injury, or where the assessment, on the face of the proceedings which impose it, is a valid lien on land, and extrinsic evidence is requisite to show its invalidity. (*Heywood v. The City of Buffalo*, 14 N. Y., 534; *Scott v. Onderdonk*, id., 9; *Allen v. The City of Buffalo*, 39 id., 386; *Newell v. Wheeler*, 48 id., 486.) The principles laid down in the cases last cited are applicable here.

It is also urged that the collection of a tax will not be restrained for the erroneous omission of some piece of property. Cases are cited which hold that a single omission is not enough; but these are decisions of the courts of other States, which are not analogous, and it does not appear in any of them that the assessments held to be valid were made in direct conflict with a statutory enactment, which is the fact here. As was held in one of the cases cited by the

respondent's counsel, where there was a flagrant misconstruction of the law affecting every taxable inhabitant it was different, and the omission vitiated the whole tax. (*State v. Collector*, 4 Zab., 121.) We are not authorized to assume that the taxes of the plaintiffs will be only increased to an amount so trifling that the court should not interfere, as it does not appear that such is the fact. The presumption is that it might make difference sufficient to justify the interference of the court, and hence the objection can have no real weight. Nor is this a case where the plaintiffs were bound to offer to pay their proportion of the assessment.

The absence of direct proof on the trial that the property omitted was benefited is not, we think, material. From its location it would seem to follow that in proportion it received the same amount of benefit as the other lands assessed. Besides, the ordinance of the common council provides that the expenses shall be paid by owners and occupants of lands to be benefited by the improvement, directs the sum which shall be assessed and states the portion of the city which they deem will be benefited. The common council thus adjudged that the lands omitted were benefited in accordance with section 192 of the charter, which, as was held on the former appeal, bound the assessors to assume that every part thereof derived some benefit and advantage, and on that assumption should be assessed.

The confirmation by the common council of the assessment in question after notice under the provisions of the charter, does not, we think, preclude the plaintiffs from the benefit of the equitable relief demanded. The provisions of the charter which relate to the confirmation of assessments (S. L. of 1861, 332, §§ 197, 198, 199) vest no authority in that body to confirm an assessment made in violation of an ordinance and where it is plainly apparent that the assessors have disregarded the same. Such a proceeding of the assessors is unavailing because they exceeded their powers, and its confirmation cannot infuse into it any element of strength and vitality or remedy the difficulty. It must

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fail because it is inherently defective, nor have the common council the power to enact or alter an ordinance of this kind without pursuing the preliminary steps which the charter requires for such a purpose. While they may enlarge the territory to be assessed in accordance with section 205, there is no authority to circumscribe the same, and when they undertake to do this they fail to conform to the statute and act in violation of its plain import. They cannot increase the amount to be assessed after proceedings have been commenced without notice, and surely they cannot do so by limiting the territory upon which the assessment is to be levied. As the assessors did not comply with the law and exceeded their authority, and the common council proceeded to confirm an assessment made in violation of the ordinance and without any legal right, there was an excess of power which is fatal to the assessment. The defect in the proceedings was more than an irregularity, and was not obviated by the confirmation of a void proceeding. When the statute makes the confirmation conclusive it has reference to a valid proceeding which is sanctioned by law and is within the jurisdiction of the assessors.

No other question requires examination, and as it is established that the court erred in dismissing the complaint the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur, except ANDREWS and EARL, JJ., not voting.  
Judgment reversed.

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WILLIAM B. VAN WOERT, Respondent, v. THE ALBANY AND  
SUSQUEHANNA RAILROAD COMPANY, Appellant.

Plaintiff contracted, by parol, to sell, and defendant to purchase, 1,000 cords of wood, or so much thereof as plaintiff could cut and deliver, at a specified price per cord; no time for performance was fixed. Plaintiff delivered, and received pay for, about 322 cords, and had about 200 cords more ready for delivery; this he commenced to draw, and had piled nineteen cords by the side of defendant's road, when he was

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notified not to bring more, that defendant did not want it; and it refused to pay for the nineteen cords. In an action to recover damages, *held*, that the partial delivery and acceptance answered the requirements of the statute of frauds, and validated the contract; that the contract was not one that could not be performed within a year; also, that the contract was not so indefinite as to be void.

(Argued December 4, 1876; decided December 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for the alleged breach of a contract to sell and deliver a quantity of wood.

The contract, according to plaintiff's evidence, was made by parol in May, 1869. By it plaintiff agreed to sell and deliver to defendant 1,000 cords of wood, or so much of that quantity as he could cut and deliver, which defendant agreed to purchase and pay for at three dollars and fifty cents per cord for hard wood, and three dollars per cord for soft wood.

Plaintiff delivered, prior to May, 1870, upon the contract, 322½ cords, which were accepted and paid for by defendant. He had about 200 cords more cut, but defendant's agent requested him to delay, as the company was about to occupy the place of delivery with new tracks. In the following winter, plaintiff commenced drawing the residue; he drew and piled up nineteen cords by the side of defendant's road, when he was notified by defendant that it did not want any more, and that he must not bring any more. Defendant refused to take and pay for the nineteen cords, or the balance ready for delivery.

The court charged, in substance, that the contract, as the plaintiff testified to it, was void under the statute of frauds; but that if they found that such a contract was made, and that the wood subsequently delivered and accepted was delivered and accepted upon that contract, such delivery and acceptance took the contract out of the statute and made it valid; and if the parties understood, when the last portion of wood was delivered in March, 1870, or when it was paid for,

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that there was such a contract, and that it was to continue thereafter and be fulfilled by the delivery of the wood at a subsequent time, the plaintiff may recover damages for the refusal of the defendant to accept the wood offered by the plaintiff to be delivered in the winter of 1870 and 1871; to which defendant's counsel duly excepted.

*J. G. Runkle* for the appellant. The contract alleged and proved by plaintiff was void for want of mutuality of obligation. (*Chitty on Pld'gs*, 297; *Chitty on Contracts*, 15; *id.* [2d ed.], 366; *Keep v. Goodrich*, 12 J. R., 397; *Livingston v. Rogers*, 1 Cai. Cas., 583; *Tucker v. Woods*, 12 J. R., 190.) It was also void for indefiniteness, ambiguity and uncertainty, both as to quantity and time of delivery. (2 Pars. on Con., 77, 78; *Buckminster v. Consumers' Ice Co.*, 5 Daly, 313.) The delivery, acceptance of, and payment, for each parcel made a several and distinct sale of each parcel, and the interpretation of these sales was a question of law for the court. (*Seymour v. Davis*, 2 Sand., 238; *Deming v. Kemp*, 4 *id.*, 147; *Banker v. Hoyt*, 18 Pick., 55.) The court erred in charging that the contract, being void because it was not to be performed within a year, could be ratified by subsequent part delivery and made valid. (*Wier v. Hill*, 2 Lans., 278; *Barilett v. Wheeler*, 44 Barb., 162; *Broadwell v. Getman*, 2 Den., 87; *Lockwood v. Barnes*, 3 Hill, 128; *Oddy v. James*, 48 N. Y., 685; *Boydell v. Drummond*, 11 East, 159; *Hervin v. Butlers*, 20 Me., 119; *King v. Welcome*, 5 Gray, 43; *Shute v. Dorr*, 5 Wend., 204; *Peters v. Westborough*, 19 Pick., 364; *Hill v. Gray*, 1 Gray, 133.)

*George Scramling* for the respondent. The contract, as proved by plaintiff, was not void on the ground that it was not to be performed within one year. (*Moore v. Fox*, 10 J. R., 244; *Lockwood v. Barnes*, 3 Hill, 128; *Artcher v. Zeh*, 5 *id.*, 200; *Bap. Ch. v. Ins. Co.*, 19 N. Y., 307; *Dresser v. Dresser*, 35 Barb., 573.) The part performance of the contract took it out of the statute of frauds. (*McKnight v. Dun-*

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*lap*, 5 N. Y., 537, 542, 543; *Good v. Curtis*, 31 How., 4, 11; *Bradley v. Wheeler*, 4 Robt., 18; *Allen v. Aguirra*, 5 Legal Obs., 380; *Boutwell v. O'Keefe*, 32 Barb., 434; *Thompson v. Mink*, 2 Keyes, 86; *Smith v. N. Y. C. R. R. Co.*, 4 id., 180; *Gault v. Brown*, 2 Am. R., 210; *Bissell v. Balcom*, 39 N. Y., 275; *Cross v. O'Donnell*, 44 id., 665; *Killmon v. Howlett*, 48 id., 569; *Webster v. Zilley*, 52 Barb., 482.) The contract was not void for uncertainty. (Code, § 169; Wait's An. Code, 315, 316; *Fells v. Vestvali*, 2 Keyes, 153; *Lobdell v. Lobdell*, 36 N. Y., 327.)

EARL, J. The jury were authorized to find, and we must assume that they did find, that there was a parol contract for the sale of wood, by which the defendant agreed to purchase and take of the plaintiff 1,000 cords of wood, or so much of that quantity as the plaintiff could cut and deliver, and pay for the same three dollars and fifty cents per cord for hard wood and three dollars per cord for soft wood; and the plaintiff agreed to deliver the whole, or so much of the 1,000 cords as he could cut and deliver.

We will assume, as most favorable to the appellant, that that was not a contract for work and labor, but one for the sale of the wood; and as there was no compliance with the statutes of frauds, that it was void when made.

There was subsequently a delivery of wood, and the judge submitted the evidence to the jury for them to find whether such delivery was upon and in pursuance of the prior contract; and as there was sufficient evidence authorizing such a finding, we must assume that they found that the subsequent delivery was upon the contract. Hence such delivery answered the requirement of the statute of frauds and made the contract of sale valid. (*McKnight v. Dunlop*, 5 N. Y., 537; *Thompson v. Mink*, 2 Keyes, 86; *Bordwell v. O'Keefe*, 32 Barb., 434; *Bradley v. Wheeler*, 4 Rob., 18.)

This is not the case of a contract not to be performed within a year. It was not such that by its terms it could not be performed within a year, but it might have been, and.

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therefore, was not void. (*Lockwood v. Barnes*, 3 Hill, 128; *Artcher v. Zeh*, 5 id., 200; *Baptist Church v. Insurance Co.*, 19 N. Y., 307.)

This was a contract binding upon both parties after the partial delivery. The plaintiff was bound to cut and deliver as much as he could up to 1,000 cords, and was bound to use reasonable efforts to perform his part of the contract; and the defendant was bound to take and pay for the wood thus delivered. Hence, there was mutuality in the contract.

The contract, as proved, was not so indefinite as to be void. There was no particular time mentioned within which the wood was all to be delivered. But the law in such a case gives the vendor a reasonable time, and that is sufficiently definite as to time. The quantity was limited to 1,000 cords, and the vendor was obliged to deliver all or so much of this as he could, and that was sufficiently definite and certain as to quantity.

We have carefully considered all of defendant's exceptions and find none of them well taken.

The opinion at General Term is so full and satisfactory that a further description of the case here is unimportant.

The judgment must be affirmed.

All concur; ALLEN, J., not sitting.

Judgment affirmed.

*List finished 112 Nov 216.*

JOSEPH M. TRAVIS v. MICHAEL J. MYERS, Assignee, etc.

CHARLES F. BROOKER, Administrator, etc., v. THE SAME, Respondent.

JOSEPH POTTER, Appellant, v. THE SAME, Respondent.

Where different actions have been brought by creditors, in behalf of themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to make an order to compel all the creditors to come in and prove their claims in the suit first brought, or wherein interlocutory



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judgment is first obtained, and to stay all proceedings in the other actions.

The terms of the order are within the discretion of the court, and cannot be reviewed here.

(Argued December 12, 1876; decided December 19, 1876.)

THIS was an appeal by Joseph Potter, plaintiff in the action last entitled, from an order requiring the creditors of defendant's assignors to come in and prove their claims in the action secondly above entitled, and restraining proceedings in the others.

These actions were brought by plaintiffs, in behalf of themselves and other creditors, against defendant, as an assignee for the benefit of creditors, for an accounting and closing up of the trust. An interlocutory decree was obtained in the second action, directing an accounting, etc.; whereupon a motion was made, on behalf of defendant, requiring all the creditors to come in in that action and prove their claims, and to restrain further proceedings in the other actions; which motion was granted.

*Joseph Potter*, appellant, in person.

*H. M. Taylor* for the respondent.

*Per Curiam.* The Supreme Court had power to make the order complained of and to compel creditors and claimants, of whom the appellant is one, to come in and prove their claims in the suit first brought by one creditor in behalf of himself and all others for an accounting by the assignee and the closing of the trust, and to stay proceedings in other actions. Such order was authorized by statute, and in conformity to the established practice of the court. (2 R. S., 183, § 106; *Innes v. Lansing*, 7 Paige, 583; *Blodgett v. Kerr*, 48 N. Y., 62; *Erie R. R. Co. v. Ramsey*, 45 id., 637; *In re Hemiup*, 2 Paige, 319.) An interlocutory decree having been made in the suit of Brooker, the order was properly made in that action. It would have been proper and no more than just to



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the present appellant had the order provided that the evidence taken in pursuance of the order of reference in his action should have been made available in the proceedings before the referee in the Brooker action. But the granting of the order and its terms were within the discretion of the court below, and cannot be reviewed in this court.

The appeal must be dismissed.

All concur.

Appeal dismissed.

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HENRY SHAFT, Administrator, etc., Respondent, v. THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, Appellant.

A defendant may raise by answer the question of a loss of jurisdiction by a State court, by reason of proceedings taken under the laws of the United States for a removal of the cause to the federal courts; and upon proof of proceedings, taken regularly and in strict accordance with said laws, he is entitled to judgment adjudging all subsequent proceedings in the State court void.

By the proceedings for removal, the State court is, *ipso facto*, ousted of jurisdiction, whether an order of removal has been granted or denied by it.

Where process for the commencement of an action in a State court against a foreign insurance corporation, doing business in the State, has been served upon it in the manner prescribed by the insurance laws of the State, and the attorney who appears for it in the State court, at the time of entering an appearance, files a petition and moves for a removal of the cause, the defendant is bound by the acts of the attorney, and the petition and filing are its acts.

A verification of the petition by the general and managing agent of the corporation in this State is sufficient; and averments in the verifying affidavits may be relied upon to show that the affiant has authority and means of knowledge.

An affidavit verifying the petition, procured and presented by the attorney for the defendant, and made by one who, having official relations with it, has means of knowledge, is a sufficient verification.

As to whether, under the statutes of the United States (R. S., U. S., 113, § 639), the verification of a petition for the removal of an action against a citizen of another State is requisite, *quære*.

*Shaft v. Phoenix Mutual Life Insurance Company* (8 Hun, 682) reversed, but upon points not discussed below.

(Argued December 8, 1876; decided December 19, 1876.)

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Statement of case.

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APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order denying a motion for a new trial, and directing judgment on a verdict.

This was an action upon a policy of insurance issued by defendant upon the life of William E. Shaft, plaintiff's intestate.

The defendant set up in its answer, among other things, that the action was commenced by the service of a summons upon Martin V. B. Bull, the person appointed by defendant, under and in pursuance of the insurance laws of this State, as its agent or attorney, upon whom all process against it might be served, and who was its general managing agent in this State; that defendant was, at the time of the commencement of the action, a citizen of Connecticut; that the matter in dispute exceeded \$500; that, at the time of entering defendant's appearance herein, a petition was filed, setting forth the above facts, for the removal of the cause into the Circuit Court of the United States, and defendant gave the security required by the United States statutes and the practice in such cases; that notice of a motion that the prayer of the petition be granted was duly served and motion made at Special Term; and defendant claimed that the Supreme Court had lost jurisdiction, and that the cause was removed into the Circuit Court.

The alleged petition was produced on the trial, signed by the attorney for defendant herein, and verified by the affidavit of said Bull, who, in his affidavit, stated that he was defendant's general and managing agent. It appeared that all the steps required by the United States statutes for the removal of the cause (R. S. of U. S., 113, § 639) were complied with; that the motion to remove was denied on the ground that it did not appear that the person making the application was authorized so to do. The order denying motion was affirmed by the General Term on appeal.

The court directed a verdict for the defendant. Exceptions were ordered to be heard at first instance at General Term.

*Samuel Hand* for the appellant. The Supreme Court lost jurisdiction by defendant's proceedings for removal to the United States Circuit Court. (*Ayers v. West. R. R. Co.*, 45 N. Y., 260; *Stevens v. Ins. Co.*, 41 id., 149.) The petition and proceedings for removal were regular and in conformity with the statute. (U. S. Stat. at Large, 79, § 12; Tomlin's Law Dict., "Petition.") The petition was properly verified. (*Bell v. Lycoming Ins. Co.*, 3 Hun, 409; *Vandevoort v. Palmer*, 4 Duer, 677; *Brewster v. Mich. Cent. R. R. Co.*, 5 Hun, 183; *Crawford v. Collins*, 45 Barb., 269.) The agent had authority to verify the petition. (*Bell v. Ins. Co.*, 3 Hun, 409; *Vandevoort v. Palmer*, 4 Duer, 677; *Glaubenskee v. Ham. Packet Co.*, 9 Abb., 144; Code, § 134; Laws 1855, chap. 279.)

*A. M. Beardsley* for the respondent. The motion to remove the cause to the United States Circuit Court was properly denied. (*Livingstone v. Gibbons*, 4 J. Ch., 94; *Redmond v. Russell*, 12 J. R., 153; *Cooley v. Lawrence*, 12 How. Pr., 176; *Chatham Nat. Bk. v. Mer. Bk.*, 4 N. Y. S. C., 200.) The agent who made and verified the petition had no authority to do so. (1 Wait's Pr., 270; Code, § 157; *Dodge v. N. W. Packet Co.*, 13 Min., 455; *Fish v. Un. Pac. R. R. Co.*, 10 Abb. [N. S.], 475.)

FOLGER, J. A defendant may raise, by answer, the question of a loss of jurisdiction by a State court, by reason of proceedings taken under the laws of the United States, for a removal of the cause to the federal courts. (*Ayres v. West. R. R. Co.*, 45 N. Y., 260.) If the proceedings are regular, and strictly in accordance with the acts of congress, the State court is *ipso facto* ousted of jurisdiction; and whether the order of removal is granted or denied by the State court, all further proceedings therein are *coram non judice* and void. (*Stevens v. Phoenix Ins. Co.*, 41 N. Y., 149.) It follows that under an answer alleging the facts, the defendant may make proof of them at the trial, and ask for the fitting judgment.

The defendant, in the case at hand, is a citizen of the State of Connecticut, within the meaning of the acts of congress (id.); the plaintiff is a citizen of this State; the amount in dispute exceeds the value of \$500, exclusive of costs; the proceedings taken by the defendant were strictly within the laws of Congress (Rev. Stat., U. S., p. 113, § 639), if the paper filed was a petition within the meaning of that law, and if it is to be held as having been filed by the defendant and properly verified.

I think that there is no doubt that it, and the filing of it, were the acts of the defendant. It appears that the process by which this action was commenced, had been served upon the defendant, as prescribed by the statute of this State, so as to bring it into court, and to give jurisdiction in the first instance. (*Gibbs v. Queen Ins. Co.*, 63 N. Y., 114.) At the time of filing the paper, the defendant also entered its appearance, by attorneys, in the State court. They, as an official act for their client, filed and presented this paper, and moved upon it in behalf of their client, for a removal of the cause. By that action the defendant was bound. It could not disavow or repudiate it to the harm or inconvenience of the plaintiff. Then it was the petition of the defendant, and the filing of it the act of the defendant.

Next: Whether the petition should have been verified to meet the requirement of the act of Congress? It is that act which gives the right of removal, and the requirements of it cannot be added to or varied by the laws of a State, or by the rules and practice of a State court. Now, the act above cited does not in terms require a verification of the petition. Its language is, that the suit may be removed on the petition of the defendant. A petition, in common phrase, is a request in writing; and in legal language, describes an application to a court in writing, in contradistinction to a motion, which may be made *viva voce*. (*Bergen v. Jones*, 4 Metc., 371; 2 Daniell's Ch. Pr., pp. 1587, 1683.) There is nothing in the thing itself, nor in the naming of it by its name alone in a statute, which demands that it should be verified. Doubtless,

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the general practice is, to verify a petition, (2 Bouvier's *Law Dic.*, *in voce*, p. 329 ; Conkling's *Treatise*, 300,) though often this is required by the standing rules of courts, rather than by the force of the term itself, or the exigency of the statute. (1 Barb. Chy. Pr., 580 [old ed.].) It is not clear that it was the intention of Congress, by the act referred to, to require that the petition should be verified. For in the same code of laws (§ 639, sub. 3), Congress has provided for the removal of a cause under a different state of facts, upon the filing of a petition, and added a requisition in terms that there shall be made and filed an affidavit. So in section 640 of the same code, declaring another cause of removal, it demands that the petition be verified. So it is by sections 641, 643. The imposition of different requirements is to be inferred from the use of different language.

If it was needful to put our decision upon this point, we should hesitate to say that it was a requisition of the federal law that the petition should be verified. And in this view we are strengthened by a decision of a United States District Court (*Sweeney v. Coffin*, 1 Dillon, 73); where it is expressly held that the petition in such a case need not be verified. In *Ogden v. Baker* (1 Green, N. J., 75) the court, on the opening of the motion, called for an affidavit, and put off the hearing until one was produced. But in that case, and in the cases there cited, it was not held that an affidavit was an essential prerequisite, the lack of which would, *per se*, defeat the application. The case of *Dodge v. N. W. Packet Company* (13 Minn., 458) cannot be taken as a decision upon this point. The case was decided by a bench of three. One dissented from the judgment *in toto*. One concurred in the judgment, solely on the ground that a corporation was not capable of availing itself of the right given by the act, in which he was in conflict with 41 New York (*supra*). The third put the decision on the ground last named, and also upon the ground that a secretary of the defendant, by whom the verification to the petition was made, was without the scope of his authority in making it. It is plain that there was no adjudication of this point.

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But it is not needed that we rest our decision upon this point. There is, at the foot of the petition, in this case, an affidavit, duly certified by an authorized officer to have been made before him. This affidavit, in proper form of words, affirms the truth of the contents of the petition. This affidavit was presented to the court, and filed, by the attorneys for the defendant. It is, thereby, the act of the defendant. The defendant offers to the court that affidavit as true. The affidavit itself is, in form and substance, sufficient. It is made by the general and managing agent of defendant, and that fact is averred in it. Now, is there any thing in a general requisition of a verification to a petition, that demands that it shall be made by the petitioner in person, and will not suffer it to be made by any one having the knowledge or information to make it truthfully? There is certainly nothing in the act of Congress. There is nothing in the nature of things. The defendant is a corporation. It must act through natural persons, in incidental services like that in question. It would be indefensible, to preclude a corporation from the benefits of this act of Congress, by insisting on an affidavit from itself, which cannot be made, or by denying its petition because none was made by it. It may be made, then, by a person acting in this respect under the authority of the corporation, and possessed of the needed knowledge or information to make it according to law. The averments of the affidavit are to be relied upon, to show that the affiant had authority and the means of knowledge. This affiant swears that he is the general and managing agent of the petitioner. This is proof, *pro hac vice*, that he had the means of knowledge of the material facts stated in the petition. It goes far, indeed, to show that he had the authority to make the affidavit. But the affidavit is produced, and formally procured by the attorneys on the record, of the defendant, acting authoritatively for it. Had one of them made an affidavit with like averments, it would have been sufficient. (*Newton Bk. v. Haverstick*, 6 Halstead, 171.) How does it differ, that empowered by the defendant to act for it in the courts, and to take any and all proceedings,

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in professional judgment best for the interest of the defendant, and thus acting, the attorneys procure a sufficient affidavit from another person, who, having close official business relations with the defendant, has means of knowledge, and that then the attorneys use it in the behalf of the defendant? An attorney at law, having appeared for a corporation, has authority to conduct the whole case. (*Faviell v. East. Co. R. W. Co.*, 2 W., H. & G., 343-351.) He has authority to obtain the incidental affidavits needed in conducting the case, and having so done and used them before a court, there is impressed upon them the sanction and authority of the corporation whom he represents.

We think that this petition was well verified; that it made a case for the defendant under the act of Congress; that the cause was, by the proceedings taken, in law removed from the jurisdiction of the Supreme Court of this State. (*Vandervoort v. Palmer*, 4 Duer, 677.) The case of *Kirkpatrick v. Hopkins* (2 Miles, 277) does not apply here, even if correctly decided. That case held that the defendant, who was a natural person, could not move on a petition signed by his attorney at law; but here the defendant, a corporation, must sign by agent, which 4 Duer (*supra*) holds to be good, even where the defendant is a natural person.

The Supreme Court having lost jurisdiction, all the subsequent proceedings before it were *coram non judice* and void, and the judgment rendered must be reversed.

All concur, except CHURCH, Ch. J., not voting.

Judgment reversed.

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ASA PACKER, Survivor, etc., Respondent, v. GEORGE P. NEVIN et al., Appellants.

This action was brought by plaintiffs, as judgment creditors of D., to have a prior judgment, in favor of defendants against D., adjudged paid and satisfied, and to restrain them from receiving the avails of an execution sale of the debtor's property, A preliminary injunction was obtained upon the ordinary undertaking, and, upon stipulation of the parties, it

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was ordered that the question of defendants' damages, if any, sustained by reason of the injunction, be heard and determined, jointly with the issues, by the referee. No evidence of damages was given on the trial; no findings of fact were made by the referee in regard thereto, nor were any requests made to find. Upon appeal from a judgment in favor of defendants, but allowing no damages, *held*, that the question of damages was not presented by the appeal; but that if presented, in the absence of proof of damages, the referee was right in not allowing any thing therefor; that it was not imperative upon the referee to make an allowance for counsel fees, without proof of a payment, or that a liability had been incurred therefor.

Also *held*, that the provisions of the Revised Statutes (2 R. S., 189, § 141, *et seq.*), requiring a deposit to be made of the amount of a judgment in case of an injunction staying proceedings thereon, did not make the amount of the deposit required the standard for measuring damages in this action, as said provisions applied only to the parties to the action wherein the proceedings were restrained, or their privies; and that even if said provisions were applicable, the deposit was dispensed with by an acceptance of the undertaking, and defendants were left to prove what their damages actually were.

(Argued December 11, 1876; decided December 19, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of defendants, entered on report of referee, so far as appealed from by defendants, and dismissing an appeal by plaintiffs on stipulation.

This action was brought originally by the members of the firm of Noble, Hammett & Co., who had obtained a judgment against one Delamater, to have a prior judgment, in favor of defendants against Delamater, decreed paid and satisfied, and to restrain them from receiving the avails of a sale, on execution, of the property of the judgment debtor. All of the members of the firm, except plaintiff Packer, died while it was pending, and it was continued by him as surviving partner. A preliminary injunction was granted upon the usual undertaking. The issues of the action were referred, and, upon stipulation, an order was entered that the referee should take the testimony upon the question of the damages sustained by the defendants by reason of the injunction, and



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should determine the amount thereof, if any; that his findings should cover that question, and that judgment should be entered thereon in accordance with his findings. It does not appear that any proof upon the subject of the damages was introduced before the referee. No findings of fact were made by him upon the subject, and there were no requests to find thereon. As a conclusion of law, the referee found that defendants were not entitled to damages.

Upon the merits of the action, the referee found that defendants' judgment had not been paid or satisfied, and directed a dismissal of the complaint. Judgment was perfected accordingly. Both parties appealed; defendants from that part refusing damages; plaintiff from that part dismissing complaint, but stipulating to waive appeal if judgment should be sustained as to damages.

*Jerome Buck* for the appellants. The standard measure of damages peculiar to injunctions to stay proceedings at law, fixed by 2 Revised Statutes, page 189, section 141, *et sequente*, was not repealed or altered by the Code. (*Cook v. Dickinson*, 2 Sandf., 690; *Watt v. Rogers*, 2 Abb. Pr., 261; *Jenkins v. Wild*, 2 Paige, 394; 1 Barb. Ch., 167; 6 Paige, 110; 2 Edw. Ch., 572; Story's Eq., § 888; *Christie v. Bogardus*, 1 Barb. Ch., 167.) It would have been proper for the referee to have allowed a counsel fee. (11 Paige, 224; 4 Edw., 392; 1 Duer, 664; 1 Barb. Ch., 613; *Willet v. Scovil*, 4 Abb. Pr., 405.)

*Samuel B. Higenbotam* for the respondent. Defendants were not entitled to damages on account of the injunction. (Sedg. on Dam., 486; 8, n; 2 R. S., 378, § 5; *Dwight v. North Ind. R. R. Co.*, 54 Barb., 271; *Hovey v. Rubber Co.*, 50 N. Y., 335; *Allen v. Brown*, 5 Lans., 511; *Strong v. De Forest*, 15 Abb., 427; Sedgw. M. D., 490, n. 105, 106, n. 1, 573; *Milton v. Hudson*, 37 N. Y., 210; *Hamilton v. McPherson*, 28 id., 72; *Thompson v. Kreider*, 8 How., 248; *Champion v. Webster*, 15 Abb., 4; *Loker v. Damon*, 17 Pick., 284; *McBride v. Farmers' Bk.*, 28 Barb., 476, 479.) Defend-

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ants having slept upon their rights for sixteen years, the maxim *vigilantibus non dormientibus jura subveniunt* should be applied. (*Van Ranset v. N. Y. Vet. Surg.*, 4 Hun, 620; *Raynor v. Pearsall*, 3 J. Ch., 585; *Movers v. White*, 6 id., 360, 369; *Bruen v. Hone*, 2 Barb., 587, 596; *Munn v. Worrell*, 16 id., 221, 232; *Hazul v. Dunham*, 1 Hall, 655, 658; *Toole v. Cook*, 16 How., 142, 144.)

MILLER, J. The appeal of the defendants in this case was from the judgment, upon the ground that it was erroneous in not adjudging damages against the plaintiff, and for the reasons stated in the exceptions served. No findings of fact were made by the referee in regard to the subject of damages; nor were any requests made to find, which would present the question fairly, whether any damages were proved, or whether the referee erred in not awarding damages. Nor was any appeal taken from the order overruling the exceptions to the referee's report. As the case stands the question was not properly presented upon the defendant's appeal, and is not now before us.

If, however, the record presented the questions raised by the appellant's counsel, the right of the defendants to damages by reason of the injunction issued in this action, was not shown before the referee, and the claim was not sustained by evidence. It does not appear that any proof upon the subject of the alleged damages was introduced before the referee who was authorized to determine whether any damages had been sustained, and if any, the amount of the same, and there is no basis upon which the referee could have made an estimate of any actual damages incurred. As the case stood, a report in the defendants' favor would have been without any evidence to support it.

It is claimed that at any rate a counsel fee should have been allowed. There was no proof of payment of a counsel fee, or that any charge had been incurred on that account, and as the referee, in the exercise of his discretion, determined otherwise, we think there is no legal ground for interfering with his decision in this respect. In most of the

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cases cited by the appellants' counsel, where a counsel fee was held to be a proper item of damages, it appeared that it had actually been paid. Within the scope of these decisions it clearly was not imperative upon the referee to make such an allowance, without some proof upon which to found his conclusion.

Nor is there any ground for claiming that the provisions of 2 Revised Statutes ([Edm's ed.], 196, §§ 141, 142 and 143) furnish us a standard for measuring damages, the deposit to be made of the amount of the judgment in pursuance of section 141, and that this is to be substituted instead of proof what the damages were. The injunction was granted upon the ordinary undertaking required by the Code, and evidently was in the proper form for such an order where the plaintiffs were entire strangers to the judgment of the defendants, the collection of which was enjoined. The statutes cited have no application to such a case; but only related to parties to the same action, and their privies. It is alone in this class of cases that a deposit is required, which may be applied in satisfaction of the judgment, when the court determines that it is valid and binding. But even if these provisions were at all applicable, the deposit was dispensed with by an acceptance of the undertaking, and the defendants should be left to pursue their remedy by proving what the damages sustained actually were. If they received the amount realized on the sheriff's sale of the property, or it was within their control, then they would probably have lost nothing, and as there was no proof to show how this was, or that any damages were incurred, it cannot be claimed that they sustained any loss.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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IN THE MATTER OF THE PETITION OF JEREMIAH H. MOORE TO  
VACATE AN ASSESSMENT.

The petitioner filed his petition under chapter 338, Laws of 1858, asking to vacate an assessment for a local improvement in the city of New York. The prayer of the petition was granted by the Special Term, but the order thereon was subsequently vacated by a Special Term order, which was affirmed by the General Term. No order was made, however, denying the prayer of the petition. *Held*, that the General Term order was not appealable under subdivision 3 of section 11 of the Code, as it was not a final order; that the result of the order was to leave the petition undisposed of and ready to be brought again to a hearing.

(Argued December 12, 1876; decided December 19, 1876.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, affirming an order of Special Term, setting aside a Special Term order vacating an assessment on certain property in the city of New York for regulating Second avenue between Ninety-second and One Hundred and Eighth streets. The petition was filed under chapter 338, Laws of 1858, upon the ground that the assessment was not confirmed by the common council and because the resolutions authorizing it were not published as required. The order granting the prayer of the petition was, upon motion, set aside upon affidavits showing that the petitioner was not the owner and had no interest in the premises.

*A. B. Johnson* for the appellant. The motion to vacate not having been made within a year, the court had not authority to grant it. (*Van Benthuyssen v. Lyle*, 8 How., 312; *Whitney v. Kenyon*, 7 id., 458; *Park v. Atwell*, 5 id., 381; *Potter v. Rowland*, 8 N. J., 448.) No appeal was taken from the order vacating the assessment, and no substantial right of the adverse party was affected. (*In re Douglas*, 46 N. Y., 42; *In re Astor*, 50 id., 363; Code, § 176.)

*D. J. Dean* for the respondent.

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*Per Curiam.* The only authority for this appeal must be found in subdivision 3 of section 11 of the Code, in which it is provided that an appeal will lie to this court "in a final order affecting a substantial right made in a special proceeding." The order here appealed from is not a final order. The petitioner filed his petition under chapter 338 of the Laws of 1858, asking that a certain assessment be vacated. The prayer of the petition, after a hearing at Special Term, was granted by an order duly entered. This order was subsequently, by an order at a Special Term, vacated, and this order was affirmed at General Term; but no order was made denying the prayer of the petition. The result of these orders was to leave the petition as filed in the court ready to be brought to a hearing again. The merits of the case had not finally been disposed of. The petitioner should have gone back to the Special Term and brought his case to a hearing again, and if there defeated, he could, after affirmance at the General Term, have brought his case here by appeal.

The appeal must be dismissed, with costs.

All concur.

Appeal dismissed.

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MARY E. DENHAM, et al., Appellants, v. MARK CORNELL,  
impleaded, etc., Respondent.

Where one having an interest in lands dies intestate after the sale thereof, his interest in the money realized from the sale is personal estate and goes to the administrators, not to the heirs at law.

Mrs. C., a married woman, owned certain lands subject to a mortgage, which was foreclosed. C., her husband, in fraud of her rights, bid off the premises, in his own name, on foreclosure sale and caused the same to be conveyed to H., who thereafter, at the request of C., conveyed to J. & M. in trust for C. C. contracted to sell the premises to S., but before conveyance Mrs. C. commenced this action, to restrain the conveyance, to have herself declared the beneficiary, and to compel a conveyance by J. and M. to herself. Upon motion for a preliminary injunction, an order was granted with the consent of plaintiff that the sale to S. should be completed, plaintiff also giving a deed, and that

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the proceeds, after deducting certain liens, be paid into court to abide the event. This order was complied with. Mrs. C. thereafter died, her husband was appointed administrator, and her heirs at law were substituted as plaintiffs herein. *Held*, that C. was entitled to the balance of the proceeds, as administrator, and that the complaint was properly dismissed.

(Argued November 23, 1876; decided December 23, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 7 Hun, 662.)

This action was brought originally by Maria Jane Cornell, wife of defendant Mark Cornell, to restrain the perfecting of a sale of certain premises in Westchester county to defendant Stewart; to have it adjudged that a deed conveying said premises to defendant Hopper in trust for defendant Cornell and a deed from Hopper to defendants Jayne and Mercer, also in trust for Cornell, were taken, and that the premises were held thereunder in trust for plaintiff as the rightful owner.

The referee found in substance as follows:

That the original plaintiff was, in the year 1869, and prior thereto, the owner in her own right of the tract or farm described in the complaint. That at the time there was a mortgage thereon to one Todd, which was being foreclosed; that a decree of foreclosure and sale was made on the 15th day of February, 1869. That prior to the sale under said decree, and on or about the month of March, 1869, plaintiff's husband, the defendant Mark Cornell, called upon her agents, the defendants Jayne & Mercer, and assuming to act on behalf of, and as agent for her, obtained from them the sum of \$500 as an advance upon the account of said Maria Jane Cornell, promising to use the said sum to stop the foreclosure proceedings and sale above mentioned, and representing that he could with said sum stop the said foreclosure, and obtain a loan upon the property for an amount sufficient to pay the balance due on said mortgage being foreclosed, and agreed and undertook to do the same, and said sum was advanced by the said Jayne & Mercer on

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the faith of said undertaking. That Cornell attended the sale of said premises under said decree, and purchased in his own name; that he directed the sheriff to make the deed to defendant, Edward Hopper, Jr. That the said Hopper executed a mortgage upon said premises to one William Purdy to secure the sum of \$3,000, which sum, with the sum of \$370, was paid by Cornell to the sheriff to procure the deed. That at the request of Cornell the said Hopper executed a deed of the premises to Jayne & Mercer, who executed a declaration of trust or agreement to the effect that they held the said premises in trust, first to secure the payment of \$5,000 and interest from December 15, 1869, advanced by John Denham to the said Mark Cornell and Maria Jane, his wife; and second, after said sum and interest were paid to hold the said premises for the use and benefit of Mark Cornell, and agreed that they would convey the said premises to whomever the said Mark Cornell might direct. That on or about the 29th day of May, 1871, Cornell agreed to sell the premises to defendant Alexander T. Stewart, for \$14,000, and directed Jayne & Mercer to execute a deed thereof to said Stewart. That upon an order to show cause why a preliminary injunction should not be issued, and upon motion of plaintiffs' counsel, an order was granted directing a completion of the sale to Stewart; that plaintiff should also execute a deed to him; that defendants Jayne & Mercer should, out of the purchase-money, pay the sum provided for in the declaration of trust and the amount due on the mortgage to Purdy, and that they should pay the balance into court to abide the event of the action; which order was complied with. That the said Maria Jane Cornell died on or about the 25th day of January, 1872, intestate, and by an order of this court the action was revived and continued in the names of the present plaintiffs, who are the heirs at law of the said Maria Jane Cornell. That on the 2d day of February, 1872, the said Mark Cornell was duly appointed, and now is the administrator of the goods, chattels and credits of the said Maria Jane Cornell. And as conclusions of law the referee found that the said Edward Hopper, Jr.,

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and the said Jayne & Mercer took and held the premises described in the complaint in trust for the said Maria Jane Cornell, subject to the mortgage executed to Purdy, and to the payment of whatever might be found due from Maria Jane Cornell to said Jayne & Mercer under the said declaration of trust. That by virtue of the order of this court and the deeds in pursuance thereof the proceeds of sale became and were personal property. That the present plaintiffs were not entitled to the relief demanded in the complaint, and said complaint should be dismissed.

*Wm. Peet* for the appellants. The doctrine of equitable conversion applies to this case and preserves the rights of Mrs. Cornell in the real estate. (L. & D. on Eq. Con., 2; Story's Eq. Jur. [11th ed.], 862, § 793.) The substitution of the money for the land could not change the rights of the parties unless Mrs. Cornell so intended it. (*Moses v. Murgatroyd*, 1 J. Ch., 119, 130; *Shumway v. Cooper*, 16 Barb., 556; *Foreman v. Foreman*, 7 id., 215; 11 N. Y., 544; *Hoey v. Kinney*, 10 Abb., 400; *Robinson v. McGregor*, 16 Barb., 531; *Durando v. Durando*, 23 N. Y., 331; *Williams v. McClanahan*, 3 Metc. [Ky.], 420; *Lloyd v. Hart*, 4 Barr., 473; 2 White's Eq. Cas. Pl., 1, p. 422; *Lynn v. Gephart*, 27 Md., 547; *Horton v. McCoy*, 47 N. Y., 21, 27; *Swezy v. Thayer*, 1 Duer, 286, 308, 309.)

*I. T. Williams* for the respondent. The real estate having become personal property by the sale before the death of Mrs. Cornell on the joining of issue herein, it would go to the respondent as surviving husband and as administrator of her estate. (1 R. L. of 1813, p. 539; 28 Cas., 2 ch., § 25; 1 P. Wms., 381, 388; 3 Atk., 527; *Whitaker v. Whitaker*, 6 J. R., 112; *Schuyler v. Hoyle*, 5 J. Ch., 196; 2 R. S., 75, § 80; *Graham v. Dickinson*, 3 Barb. Ch., 169, 173; *Bogart v. Furman*, 10 Paige, 496; *Lorillard v. Costar*, 5 id., 218; *Bogert v. Herbert*, 4 Hill, 492, 495; *Stagg v. Jackson*, 1 N. Y., 212; *Downing v. Marshall*, 2 id., 366, 392; *Horton v.*



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*McCoy*, 47 id., 21, 25; *Savage v. Burnham*, 17 id., 569.) The conveyance by Mrs. Cornell was a ratification of the agreement to sell. (*Newton v. Bronson*, 13 N. Y., 587, 594.)

FOLGER, J. As matter of fact, the real estate of which Mrs. Cornell was once the owner, has been converted into personal property. This was done in her lifetime. It was done with her assent, and it was done with the sanction of the court; as a consequence legally flowing from the acts of her husband, by which acts she was bound, as far as Stewart, the purchaser, was concerned. Doubtless she had the same right to follow those moneys, which she would have had to pursue the land had it not been sold to Stewart. And so far, the moneys are to be regarded as impressed with the character of real estate, so that her equitable right to them may be sustained. But it is a different question, what would have been their character, had she succeeded in her action, and in her lifetime reduced them to possession. In such case, they would have been moneys in her hands, personal property. And so it is a different question, she dying her action undetermined, whether her heir at law or her administrator may follow them. Mrs. Cornell was in reality, in the first instance, the owner only of the equity of redemption in the lands, they having been mortgaged to one Todd. His mortgage had been foreclosed. If the sale in that foreclosure suit had been regular and without fraud towards her, all that Mrs. Cornell could have done would have been to obtain the surplus moneys, if any. She would have been entitled to these, as owner of the equity of redemption; but they were personal property, and would have been such in her hands when recovered. (*Wright v. Rose*, 2 Sim. & Stu., 323.) Had she died before the sale, the heir at law becoming the owner of the equity of redemption, would likewise have been entitled to them; but when obtained by him, they would have been personal property in his hands. If she had died after the sale, after the equity of redemption had by operation of law been converted in fact into moneys, the administrator would have been entitled

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to them. (*Graham v. Dickinson*, 3 Barb. Ch., 169.) For neither she nor the heir at law would obtain them as in fact real estate; but as a personal fund, to which there was a right of resort, as a remuneration for the loss of the equity of redemption. (Id.)

Now in essence, the situation of the case is not different from that above supposed. There was a sale in the Todd foreclosure. It was fraudulent against Mrs. Cornell, so far as the purchaser, at that sale, was concerned. She could not, however, have disturbed the mortgage to Purdy, given thereon. All that she could have done, would have been to have maintained her right to the lands, subject to the Purdy mortgage. And so of the subsequent transactions, down to the contract of sale to Stewart; she being bound as to innocent third parties, by the acts of her husband, whom she had clothed with seeming authority, they were in effect but a continuation of the same right. She then became the rightful owner of all the unpaid purchase-money; not as real estate, but as a personal fund, to which she had an equitable right to resort, to remunerate her for the loss of her right of redemption from the mortgages. Her quit-claim deed and the order of the court were, in conjunction with the prior facts, and the legal results therefrom, as the operation of law, changing in her lifetime, her interest in the lands into personal estate, with such an equitable impress thereon, as enabled her to follow it (though it had become personalty), for her remuneration. As it became personalty in her lifetime, it must follow the course of that kind of estate, and go to her administrator. These are the rules which govern this transaction. Where real estate is, by virtue of a devise or grant, sold for a particular purpose, he who would at the time of the sale be entitled to the land if it were not sold, is entitled to the money for which it is sold. But if the one who is so entitled to the money, dies after he has received it, or after he has attained the right to receive it, the money is personal estate and goes to the administrator and not to the heir at law. (*Cruse v. Barley*, 3 Peere Wms., 19; \*22 and note 1, where many authorities

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are collected.) For the purpose of seeing it more clearly, the proposition may be differently stated. When the interest of the decedent has been in the land, and he has died before conversion, then his interest in the avails of the conversion goes to his heir at law. Where the conversion has taken effect before the death of the decedent, then his interest in the avails goes to the administrator. (Leigh & Dalzell on Eq. Conv.,\* 96 [Law Lib., vol. 5, p. 47].) The cases illustrate those propositions. If one recover a judgment against the owner of an equity of redemption, before a sale on foreclosure of the mortgage, the judgment is a lien upon surplus moneys arising upon the sale. If the judgment be got after the sale, though before distribution of the surplus, there is no lien upon them. (*Sweet v. Jacocks*, 6 Paige, 355; *Douglass v. Houston*, 6 Ohio [Hammond], 182.) If real estate of a bankrupt be sold, during his lifetime, by the commissioners in bankruptcy, the surplus moneys in their hands, after the payment of the debts of the bankrupt, go to his administrators. If the sale had been after his death they would have gone to his heirs at law. (*Banks v. Scott*, 5 Madd., 493.) So it is in the case of estates of lunatics. (*Oxenden v. Lord Compton*, 2 Ves., Jr., 69.) So where property is sold by a decree of a court of equity in some cases and the executor is a party, the real and personal representatives of the testator must take the property as they find it. (*Flanagan v. Flanagan*, cited in *Fletcher v. Ashburner*, 1 Bro. C. C., 497-500, and approved in *Walker v. Denne*, 2 Ves., Jr., 170-176.) The maxim of equity, *fieri non debet sed factum valet*, applies even in the case of the real estate of an infant where the law most jealously preserves the prime character of the property. If there has been a sale of lands for a specific purpose and a surplus has arisen, it is at first given to the heir at law rather than to the next of kin. Yet after it has once vested in the person thus entitled, it is ever after to be treated as money, and on his death it passes as personal estate. (*Pennell's Appeal*, 20 Penn. St. [8 Harris], 515; approved in *Sayers' Appeal*, 79 id., 428.)

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It is plain that in the lifetime of Mrs. Cornell she was entitled to these moneys. By the force of those rules above given those moneys were part of her personal estate, and on her death transmitted by the law to her administrator and not to her heirs at law.

Hence the plaintiffs, who are her heirs at law living, or representative of an heir at law dead, have no interest which will further maintain this action.

The judgment should be affirmed.

All concur.

Judgment affirmed.

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GEORGE C. GLACIUS et al., Respondents, v. BESSIE BLACK,  
Appellant.

67	563
130	579

There is no constitutional objection to the creation by the legislature of statutory liens in favor of mechanics and others, for the purposes, and under the circumstances and limitations specified in the statutes known as mechanics' lien laws.

Where, after the commencement, and during the pendency, of an action to foreclose a mechanic's lien, the lien expires, the action may still be prosecuted as a personal action and a personal judgment may be rendered as in an ordinary action upon contract.

Plaintiffs contracted to put an attic story and mansard roof on the house of defendant, the final payment to be made when the work was "done and completely accepted." The contract specified that the sides of the attic story were to be covered with plank, the frame "to be sheathed with pine boards, sheathing to be covered with felt." In an action upon the contract to recover the final payment, defendant's evidence tended to show that a strip two or three feet wide, extending across the house on one side in the new attic story, was left by plaintiffs without any felt, covering the sheathing. *Held*, that the contract required plaintiffs to cover the entire sheathing with felt; that this was a question of law for the court, and a submission thereof to the jury was error.

*Glacius v. Black* (4 Hun, 91) reversed.

(Argued December 6, 1876; decided December 22, 1876.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment

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in favor of plaintiff entered upon a verdict, and also from an order of the General Term affirming an order denying a motion to vacate said judgment. (Reported below, 4 Hun, 91.)

This action was originally brought to foreclose a mechanic's lien under chapter 402, Laws of 1854 (the lien law applicable to Westchester county). Upon a former trial, a judgment in favor of the plaintiffs, entered upon the report of a referee, was reversed by this court (50 N. Y., 145) and a new trial ordered. Upon the second trial no lien was claimed, but a personal judgment was asked for. The jury found a verdict for the plaintiffs, and judgment was entered thereon. A motion was made by defendant for a new trial, which was denied. Defendant also moved to set aside the judgment as unauthorized, which motion was denied.

The further facts are sufficiently set forth in the opinion.

*George A. Black* for the appellant. The lien law of 1854 (chap. 402) is unconstitutional and void under the Constitution of this State and of the United States, because it deprives a person, against whom a lien is filed, of his property without due process of law. (Const., art. 1, § 6; id., art. 2, § 1; *Rockwell v. Nearing*, 35 N. Y., 302; *Mushitt v. Silverman*, 50 id., 360; *Hugford v. Bogardus*, 40 How. Pr., 94; *Happy v. Mosher*, 48 N. Y., 318; *Bowers v. Berger*, 6 id., 366; *Murray v. Hoboken Ld. Co.*, 18 How. [U. S.], 272, 278, 280; *The Kate Tremaine*, 5 Bene, 69; *The Fredonia*, 17 L. T. R., 622; *Carman v. McInerow*, 13 N. Y., 73; *Donaldson v. Wood*, 17 Wend., 553; *Spencer v. Barnett*, 35 N. Y., 96; *Vose v. Cockcroft*, 44 id., 440; *Shepherd v. Steele*, 43 id., 57; *Blauvelt v. Woodworth*, 31 id., 285; *Taylor v. Porter*, 4 Hill, 140.) Plaintiffs could not claim a personal judgment. (*Moran v. Chase*, 52 N. Y., 349.) Plaintiffs could not justify a willful departure from the contract by the opinion of other builders or by any custom, whether local or general. (*Smith v. Brady*, 17 N. Y., 178, 181.) Plaintiffs failed to show a performance of their contract. (*Bryant v. Bryant*, 42 N. Y., 17; *People v. Cook*, 8 id., 74.)

Opinion of the Court, per *Curiam*.

*Ernest Hall* for the respondents. The lien law of 1854 (chap. 402) was not unconstitutional. (*Blauvelt v. Woodworth*, 31 N. Y., 285; *Shepherd v. Steele*, 43 id., 52; *Brookman v. Hamill*, id., 554; *Happy v. Mosher*, 48 id., 285.) A personal judgment was proper. (*Glacius v. Black*, 50 N. Y., 145; *Barton v. Hosman*, 8 Abb. [N. S.], 399; *Schattler v. Gardner*, 41 How. Pr., 243; *Freeman v. Cramer*, 3 N. Y., 305; *McGraw v. Godfrey*, 8 Alb. L. J., 190; 56 N. Y., 610.) The question of performance of the contract was one of fact. (*Colwell v. Lawrence*, 24 How. Pr., 324; *Sinclair v. Talmadge*, 35 Barb., 602; *Smith v. Gugerty*, 4 id., 614; *Smith v. Brady*, 17 N. Y., 173; *Glacius v. Black*, 50 id., 145.)

*Per Curiam*. The constitutionality of the legislation known as mechanics' lien laws, was affirmed in *Blauvelt v. Woodworth* (31 N. Y., 285), and the court held that there was no constitutional objection to the creation, by the legislature, of statutory liens, in favor of mechanics and others, for the purposes and under the circumstances and limitations specified in these statutes. Laws of similar character have been in force in this State for more than forty years (Laws of 1844, chap. 220); and similar legislation is found on the statute books of many of the States. These statutes have been frequently under consideration by the courts, and, so far as we know, their constitutional validity has never been judicially questioned.

We do not doubt the soundness of the decision in *Blauvelt v. Woodworth*; and if the question admitted of doubt we should not feel at liberty, under the circumstances, to reconsider the decision in that case. We dismiss, therefore, the further consideration of the argument pressed upon us as to the unconstitutionality of the statute in question.

This action has been twice tried, and the plaintiff recovered on both trials. The first judgment was reversed by this court. (50 N. Y., 145.) The appellant then insisted that if the judgment should be reversed the reversal should be absolute, and without awarding a new trial on the ground that the lien had then expired by limitation, and that the action could not

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Opinion of the Court, per *Curiam*.

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be further prosecuted. The court, in answer to this argument, and in overruling it, said: "This position is not tenable; if the lien has expired, the action can still be prosecuted as a personal action;" and a new trial was awarded on the reversal of the judgment. The plaintiffs, on the new trial, admitted that the lien had expired; and the defendant then moved to dismiss the proceeding, on the ground that the court had no jurisdiction to render judgment therein for the claimants, after the expiration of the lien. The motion was denied, and the trial proceeded, and resulted in a verdict and judgment for the plaintiffs, as in an ordinary action upon contract.

The defendant now, again, insists that the plaintiffs could not proceed, after the expiration of the lien, to obtain judgment for their debt. This precise question was decided adversely to the defendant, on the former appeal, and is therefore *res adjudicata* in this case.

The plaintiffs entered into a written contract to put an attic story, with mansard roof, on the house of the defendant, and to complete it according to certain plans, drawings and specifications forming part of the contract, and the final payment, which they claimed to recover in this proceeding, was, by the terms of the contract, to be made when the "work is done and completely accepted." The plaintiffs, in order to recover, were bound to show that the contract had been substantially performed. It was not necessary that they should be able to show literal performance of the work in every detail, according to the specifications, as a condition precedent to a recovery, provided it appeared that the departures and variations were not willful, and were technical and unsubstantial, and in unimportant and immaterial particulars. In such cases the law allows a recovery under the contract, with compensation to the other party by way of allowance, and deduction from the contract-price for such damages as he has sustained by reason of the omission of the plaintiff to comply with the exact terms of the contract. The contrary rule would deprive a contractor, in a building contract, of all compensation, although he has in good faith endeavored to perform his contract, and

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Opinion of the Court, per *Curiam*.

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has substantially performed it, but has failed in some minor and subordinate particulars, as to which an allowance out of the contract-price would afford to the other party a complete indemnity. The rule that substantial performance is sufficient for the purpose of maintaining the action, was declared on the former appeal; and on the last trial the judge, in conformity with it, charged the jury that to entitle the claimants to recover any thing, it must appear that there had been no willful departure from the terms of the contract, or omissions in essential points, and that if there were substantial defects in the work, the plaintiffs could not recover. The jury found for the plaintiffs on this issue, and while the weight of evidence, as presented in the case, seems to be adverse to this conclusion, we are of opinion that the question was one of fact for the jury, and by their finding this court is concluded. There is, however, a point upon which the judgment must be reversed. The specifications contained this provision: "The sides of the attic story to be covered with one-inch pine plank, grooved and tongued — white pine plank, laid in the best manner \* \* \* the frame is to be sheathed with pine boards; sheathing to be covered with felt, put on in the best manner." The evidence on the part of the defendant tended to show that the walls of the old building were filled in with brick, to the point where the attic story commenced, and that the plaintiff, in constructing the new story, did not remove the old sheathing above this point, on one side of the building, except immediately below the old roof, and that a space two or three feet wide extending across the house in the new attic story was left without any felt covering the sheathing.

The defendant requested the court to charge the jury that the contract required the plaintiffs to put on the felt as low as the attic story. The judge, in reply to this request, said: "This is left for the jury to say," and the defendant excepted. There was no ambiguity in the contract in respect to the points referred to in the request. It plainly required the plaintiffs to cover the entire sheathing of the attic story with



## Statement of case.

felt. This was a question of law for the court to decide, and the judge erred in remitting it to the jury for decision. (2 Parsons on Contracts, 492, and cases cited.)

For this error of the judge, and without examining the exceptions to evidence, which have been argued, the judgment must be reversed and a new trial ordered.

All concur.

Judgment reversed.

THE PEOPLE ex rel. THE BOARD OF COMMISSIONERS OF WASHINGTON PARK, Respondents, v. A. BLEECKER BANKS, Mayor, etc., Appellant.

The act entitled "An act in relation to that portion of the Great Western Turnpike road, commonly known as Western avenue," etc. (chap. 445, Laws of 1876), is not obnoxious to the constitutional provision (State Const., art. 3, § 16) requiring that local and private bills shall embrace but one subject, which shall be expressed in the title; the act simply authorizes a conveyance by the turnpike company, and an acceptance by the commissioners of Washington park, of a portion of the turnpike road, and empowers the latter to improve the same as an approach to the park, and makes provisions for such improvement. The whole relates solely to the portion of the road specified in the title, and the purpose of the act is confined to the one subject, which is sufficiently expressed in the title.

The legislature is not subject to judicial control in respect to the form or mode in which the "subject" of a bill shall be "expressed" in its title; if expressed, the Constitution is satisfied, although the title may have been more explicit.

The authorities upon the question of the sufficiency of the titles to bills, under the said constitutional provision, collated.

The said statute is not in conflict with the constitutional provision forbidding the passage of a private or local bill "laying out, opening, altering, working or discontinuing roads, highways or alleys." (Art. 3, § 17.) This provision was intended to prevent any interference with the general highway system of the State. The portion of the road affected by the act, while a public highway, was the property of a private corporation. and the act provides for that which is not ordinarily done under the general highway laws, and for which no general provision is made, and it was within the legislative power to confide it to the commissioners.

67	568
109	108
67	568
112	589
67	568
135	228
67	568
139	514
67	568
150	443

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Said statute is not violative of the constitutional provision declaring that no act shall be passed making an existing law applicable to, or a part thereof, except by inserting it in the act. (Art. 3, § 17.) This provision does not require the re-enactment of general laws whenever it is necessary to resort to them to carry into effect a special statute.

The legislature may direct that an assessment for the costs and expenses of a work, specially provided for and directed to be paid by tax, shall be made and collected in the manner provided by general laws.

Said statute is not in conflict with the constitutional provision prohibiting cities from loaning their money or credit to, or in aid of, any individual, association or corporation. (Art. 3, § 11.) The fact that the city of Albany is in the first instance made to pay the cost of a public burden, to be reimbursed thereafter by tax upon the property benefited, does not constitute the payment a loan to the property owners.

(Argued December 12, 1876; decided December 22, 1876.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department affirming an order of Special Term directing a *mandamus* to issue requiring defendant, as mayor of the city of Albany, to prepare and sign certain bonds of said city as provided in and by chapter 445, Laws of 1876, entitled "An act in relation to that portion of the Great Western Turnpike road commonly known as Western avenue, lying between Snipe street, in the city of Albany, on the east, and the west line of the proposed new boulevard, intersecting the said road west of Allen street, in said city, on the west."

It was conceded that all the provisions of the said statute, which, by its terms, were made by the act prerequisites to the issuing of the bonds by the mayor, had been complied with, and the only questions raised were as to the constitutionality of the act.

*Isaac Lawson* for the appellant. Chapter 445, Laws of 1876, is a local act, and its subject is not expressed in its title in compliance with the provision of article 3, section 16 of the Constitution. (*People v. Hills*, 35 N. Y., 453; *Town of Fishkill v. F. and D. Plk. Rd.*, 22 Barb., 641; *Smith v. Mayor, etc.*, 7 Rob., 190; *Durkee v. City of Janesville*, 26 Wis., 700; *Comm.*

## Statement of case.

v. *Dickinson*, 9 Phil., 561; *In re Van Antwerp*, 56 N. Y., 267; *People ex rel. v. Bennett*, 54 Barb., 486; *People ex rel. v. Lawrence*, 41 N. Y., 139; *In re Volkenning*, 52 id., 650; *Conner v. Mayor, etc.*, 5 id., 285; *People ex rel. City of Rochester v. Briggs*, 50 id., 553; *Brewster v. City of Syracuse*, 19 id., 116; *In re Meyer*, 50 id., 504; *In re Assmt. Lands in Flatbush*, 60 id., 398; *People ex rel. v. Comrs. of Highways*, 53 Barb., 70; *People ex rel. v. Common Council of Bklyn.*, 13 Abb. [N. S.], 121.) The act was in conflict with article 3, section 18 of the Constitution, which forbids the passage of a private or local bill for "laying out, opening, altering, working or discontinuing roads, highways or alleys." (*People ex rel. v. Bd. of Suprs.*, 52 N. Y., 561; *Wyenheimer v. People*, 13 id., 454, 486; *People v. Allen*, 42 id., 404; *People v. Hill*, 35 id., 452; *People ex rel. v. Flagg*, 46 id., 405; *People v. Board, etc.*, 25 Mich., 157; *City of Atchison v. Bartholow*, 4 Kans., 124, 141-149; *Williams v. Biddleman*, 7 Nev., 68, 70-73.) The act was in conflict with article 8, section 11 of the Constitution, which forbids a city to "give any money or property, or loan its money or credit to or in aid of any individual, association or corporation." (*People ex rel. v. Bd. Suprs.*, 52 N. Y., 563; *Wyenheimer v. People*, 13 id., 433-439; *People ex rel. v. Albertson*, 55 id., 50.) The attempted lease by the park commissioners was *ultra vires* and void. (17 Barb., 601; 33 Me., 132; 12 Eng. L. and Eq., 224; 19 id., 584.)

*R. W. Peckham* for the respondents. The act of 1876 (chap. 445) is local, but the subject is expressed in its title within the meaning of section 16 of article 3 of the Constitution. (*In re Mayer*, 50 N. Y., 504; *People v. Briggs*, id., 553; *In re Astor*, id., 363.) It is not a violation of section 17 of article 3 of the Constitution as to making any existing law a part of the statute without inserting it in full. (2 N. Y. Weekly Dig., 416; *People v. Hoyt*, 7 Hun, 39; *People v. Learned*, 5 id., 626.) It is not in conflict with section 18 of article 3 of the Constitution, as it makes no provision for lay-

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Opinion of the Court, per ALLEN, J.

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ing out, opening, altering, working or discontinuing roads, highways or alleys. (1 R. S., 513, § 54; id., 505, § 19; id., 520, § 99; id., 517, § 74; id., 511, § 45; id., 509, § 35.) The act sets forth with sufficient distinctness the tax and the object to which it is to be applied. (*People v. Flagg*, 46 N. Y., 401.) Section 20 of article 3 of the Constitution refers to State, and not to local, taxation. (*Darlington v. Mayor*, 31 N. Y., 186; *People v. Havemeyer*, 4 T. & C., 378; *In re Ford*, 6 Lans., 92; 8 Hun, 97.) Those alleging the invalidity of a legislative enactment are bound to show it affirmatively. (*People v. Briggs*, 50 N. Y., 553; *People v. Dayton*, 55 id., 367.)

ALLEN, J. The act upon which the relators base their claim of right to demand the issue by the defendant and appellant, as the mayor of the city of Albany, of the corporate bonds of the city (Laws of 1876, chap. 445) is mandatory, and as it is conceded that all the conditions and provisions of the law to entitle the relators to the relief demanded have been complied with, if the law is in form and substance a valid and constitutional exercise of legislative power, the writ of *mandamus* was properly granted by the Supreme Court, and the order must be affirmed.

The legislative power over the general subject-matter of the act is not denied, but that it has been constitutionally exercised is denied upon several grounds.

First. The first objection is that the title is defective, and does not express the "subject" of the act as required in respect to all private and local bills, by section 16, of article 3 of the Constitution. The act is entitled "An in relation to a portion of the Great Western Turnpike road," particularly described in the title and in the body of the act. The act authorizes a conveyance by the turnpike company, and an acceptance of the same by the relators of a portion of its turnpike road described, and empowers the latter to improve the same as an approach to the Washington park.

The other parts of the act make provision for the improvement and ornamentation of the portion of the road so author-

*v. Dickinson*  
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and for the payment of the cost of such improvement and the keeping the same in repair. The whole act "relates" solely to this portion of the turnpike road, and so no other subject or matter. The purpose and object of the act is confined to this one subject, and it is not claimed that the act embraces more than this one subject. The allusion to Washington park is incidental, and that was not the subject of the legislation embodied in the act. The complaint is, that the title does not, with sufficient distinctness, "express" or indicate the "subject" of the act. If by this is meant that the title does not disclose or shadow forth the character of the proposed legislation, its full object and purpose, and make known the several interests which may be directly or indirectly affected by it, so as to attract attention, and gives notice of all that was to be accomplished by the proposed "act," this will be conceded. But the Constitution does not require this full declaration and statement in the title of a private or local bill. This has been repeatedly held.

It is not allowable, for the purpose of invalidating a law, to sit in judgment upon its title, to determine with critical acumen whether it might not have been more explicit, and so drawn as more clearly and definitely to indicate the nature of the legislation covered by it. The legislature is not subject to judicial control in respect to the form or mode in which the "subject" of a bill shall be "expressed." If it is expressed, the Constitution is satisfied.

The provisions of the act are consistent with the title, and the whole act does "relate" to the "subject," that is, the portion of road described. The title does not mislead, as was the case of the assessment of lands in Flatbush, Kings county (60 N. Y., 398), and *The People v. Commissioners, etc., in the Matter of C.* (52 Barb., 70). It does declare the subject, viz., the described portion of the road as that which is treated of in the bill, and to be acted upon by the legislature, and in some way affected by the act.

This particular provision of the Constitution has been so

per ALLEN, J.

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Opinion of the Court, per ALLEN, J.

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frequently before the courts that an extended discussion of the effect to be given to it, and the extent and limit of its requirements, would be out of place.

The title of the act under review must, within the well-considered decisions of this court, and of the other courts of the State, be held a sufficient compliance with the Constitution, and to hold otherwise would subvert very many cases which are binding upon us as authorities.

In the following cases the titles were held sufficiently expressive of the subject of the several acts called in question for non-compliance with this clause of the Constitution.

By an act entitled "An act in relation to the fees and compensation of certain officers in the city and county of New York," salaries were given to four city officers in lieu of fees, and they were required to pay the fees named into the treasury of the city. (*Conner v. Mayor, etc.*, 1 Seld., 285.)

In the *Matter of Volkening* (52 N. Y., 650) the petitioner challenged the validity of a statute transferring the power before then vested in the common council of the city in relation to assessments, and the confirmation thereof to certain officers created by the act into a board called a board of revision, under the title of "An act relative to contracts by the mayor, aldermen and commonalty of the city of New York."

An act entitled "An act in relation to certain local improvements in the city of New York," under which an assessment for a sewer was levied, was sustained in the case of *Morgan* (50 N. Y., 504). The question in *The People v. Briggs* (id., 553) was upon a statute entitled "An act to amend the several acts in relation to the city of Rochester," and by which, among other things, power was conferred upon the water commissioners to contract with the villages through which they might bring water for the city of Rochester for a supply of water to such villages.

In *Brewster v. The City of Syracuse* (19 N. Y., 116) the title of the act was "An act for the relief of James Ley & Son," and authorized an assessment upon a portion of the city of Syracuse, to satisfy a claim of the individuals named in

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Opinion of the Court, per ALLEN, J.

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the title against the city for a local improvement constructed by them. (See also *Matter of Astor*, 50 N. Y., 363.) Within the principles of these cases and others which might be cited, the title of the act under consideration must be held sufficient.

Second. It is next objected that the act is in conflict with section 18 of article 3 of the Constitution, forbidding the passing by the legislature of any private or local bill "laying out, opening, altering, working or discontinuing roads, highways or alleys." This provision was designed to prevent any interference with the general highway system of the State, or with the keeping of the ordinary highways and public roads in repair under that system, and the supervision of the officers designated, and in the use of the means and the labor provided by law. The act under review does not, in any of its provisions, provide for the altering, opening, or working of a highway, in the sense which those terms were used in the statutes of the State, regulating highways and public roads, or the Constitutional provisions now invoked.

The portion of the road which was the subject of the legislation was at the time a public highway, but was the property of a private corporation, and was kept in repair by the tolls levied upon the public using it. The public easement was subject to the payment of the toll. By the transfer of the way to the relators it was continued as a public highway for the benefit of the public, but provision was made for grading, paving, sewerage and ornamenting the same, and the laying of sidewalks thereon, and making the same a fitting approach to and substantially a part of the Washington park, subject to the general easement of the public for use as a highway.

The improvements contemplated could not be made, and the avenue kept up and maintained in proper condition under the general laws of the State, and the legislature in its wisdom saw fit to suffer the turnpike company to surrender it to the park commissioners, and did not see fit to place it in charge of the common council, as one of the streets and avenues of the city. This was within the discretion of the legislative body, and we cannot review the exercise of that discre-

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Opinion of the Court, per ALLEN, J.

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tion, or sit in judgment upon it. The act provides for that which is not ordinarily done under the general laws for regulating public highways, or the streets of a city, and for which no general provision is made by law, and which, in the judgment of the legislature, might be properly confided to the relators. This was within the legislative power. (*People v. Flagg*, 46 N. Y., 405.)

Third. The third objection is that the act is violative of section 17 of article 3 of the Constitution, declaring that no act should be passed which shall provide that any existing law or any part thereof shall be made or deemed a part of said act, or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act.

We have had occasion to consider this provision, and were of the opinion that it did not prohibit the subjecting a matter of special legislation to some provisions of the general statutes of the State regulating the procedure, to accomplish the purposes of the act, and was not applicable to a case like this, where the legislature, after enacting that the costs and expenses of a work specially provided for, shall be paid by a tax upon property, have directed that the assessment should be made, levied and collected in the manner provided by general laws.

It is not necessary, in order to avoid a conflict with this article of the Constitution, to re-enact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the Constitution, or the mischief intended to be remedied. By such a reference the general statute is not incorporated into or made a part of the special statute. The right is given, the duty declared, or burden imposed by the special statute, but the enforcement of the right or duty, and the final imposition of the burden are directed to be in the form, and by the procedure given by the other and general laws of the State. Reference is made to such laws, not to affect or qualify the substance of the legislation or vary the terms of the act, but merely for the formal execution of the law. The evil in view in adopting this provision of the Constitution, was



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Opinion of the Court, per ALLEN, J.

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the incorporating into acts of the legislature by reference to other statutes, of clauses and provisions of which the legislators might be ignorant, and which affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law, which would not receive the sanction of the legislature if fully understood.

There is no evil of this or of any nature to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure, for giving effect to a statute otherwise perfect and complete. It would be a serious evil to compel the engrafting upon and embodying in every act of the legislature all the forms and the details of practice which may be necessarily resorted to to carry any one statute into effect, when the same proceedings are provided for by the general statutes of the State, and are applicable to hundreds of other cases, and with which the legislators may be supposed to be reasonably familiar.

This objection, we think, not available to the defendant.

Fourth. The fourth and only remaining objection is that the statute is in conflict with section 11 of article 8 of the Constitution, prohibiting cities from loaning their money or credit to, or in aid of, any individual, association or corporation.

The answer to this is that there is no loan of money or credit contemplated. The city of Albany is in the first instance made to pay the cost of a public burden, and the fact that the city treasury is to be reimbursed hereafter by tax upon property, an assessment upon the property benefited does not constitute the payment in the first instance, a loan to the individual property owners benefited.

The municipality is primarily liable, and the reimbursement but an equitable procedure as between the whole body of tax-payers, and those whose property is especially benefited by the work.

All the questions made were fully considered by Justice WESTBROOK at the Special Term of the Supreme Court, and we concur in his opinion then given.

The order must be affirmed.

All concur.

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Opinion of the Court, per ALLEN, J.

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FOLGER, J., was inclined to hold that the bill was defective; for the reason that either there were two subjects embraced in it, or, if but one, that the title did not express the whole of that subject. There being a judgment arrived at without his voice, he did not vote.

Order affirmed.

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# MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS  
VOLUME, WHICH ARE NOT REPORTED IN FULL.

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ELBERT W. COOK, Appellant, *v.* PHILETUS ALLEN et al.,  
Respondents.

(Argued June 19, 1876; decided September 19, 1876.)

THIS action was brought to recover of defendants, as trustees of school district No. 6, in the town of Concord, Erie county, a balance claimed to be due plaintiff for work, labor and materials in building a school-house. The defence was that the work was done under a special contract and plaintiff had been paid a sum which, with money defendants had expended to complete the work plaintiff had agreed to do, equaled the contract-price. At the commencement of the trial it was stated that the pleadings were lost, and the counsel agreed in open court to try the case upon the merits without pleadings. *Held*, that the agreement was binding, and it was not competent thereafter, upon the trial or upon appeal, to raise any question based upon any defect or insufficiency of the pleadings.

Defendants gave evidence tending to prove a verbal contract, as claimed by them. It was understood that the contract was to be reduced to writing, and an instrument was drawn containing its terms, to the correctness of which plaintiff assented, but it was not executed. Plaintiff introduced in evidence a copy of this paper. It contained an agreement on the part of plaintiff to build a school-house "agreeable to the draft, plan and explanation hereto annexed, of substantial materials, to be described in the annexed plan." Then followed these specifications: "The said school-house to be built

of brick, the walls to be eight inches thick and two feet in the clear, and built on a good and substantial foundation, with a basement for storing wood. The seats and desks to be finished after the plan laid down in the fifth edition of Barnard's School Architecture, page 94, plan No. 1. The seats and desks to be made of pine or some other suitable wood of a good merchantable quality. To be furred out, lathed and plastered in good workmanlike manner. The floor to be of good, sound hemlock, or hard wood, of good merchantable quality. The house to be partitioned and divided according to the above plan." Following this were provisions for roof, painting, etc. No other plan or specifications were made. The school-house was built and accepted by the trustees. It was proved that the only plans and specifications contemplated were those contained in the paper and in the book referred to, and that the paper was not signed when presented to plaintiff because there was no pen and ink convenient. The court submitted the question to the jury whether the plan and specifications mentioned in the paper referred to any thing not contained therein or in the book referred to, and charged that if it referred to other plans the defence was not made out. Plaintiff's counsel excepted, insisting that the court should decide the question as matter of law, and requested the court to hold that the paper did refer to other plans. This was refused. *Held*, no error; that the court might have held as matter of law from the evidence that the plan and explanation specified were those contained in the paper and the book; that the literal meaning of the words "hereto annexed" was not controlling where from the circumstances it was apparent they were intended to mean herein specified or referred to, and that it was not improper to submit the question of fact to the jury under proper instruction. But that it was not material whether the words referred to an outside paper or not, if a specific contract as to price was made; if it was intended to have a separate plan, etc., annexed, and the parties proceeded to, and did, perform the contract, the omission to make the plan would not change the contract from a fixed price to a *quantum meruit* compensation, at least as defendants relied upon a parol contract; if the unexecuted paper would, if executed, have been

defective, they not having produced it, were not responsible for it.

*John C. Strong* for the appellant.

*Wm. C. Gurney* for the respondents.

All concur; ALLEN, J., absent.

Judgment affirmed.

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THE PEOPLE ex rel. RUSSELL H. ROOT et al., Respondents, v.  
J. NELSON TAPPEN, City Chamberlain, etc., Appellant.

(Argued June 20, 1876; decided September 19, 1876.)

THIS case involved the same questions as *Dannat v. The Mayor, etc.* (66 N. Y., 585).

*D. J. Dean* for the appellant.

*William Herring* for the respondents.

FOLGER, J., reads for reversal of order and denial of application.

All concur; ANDREWS, J., absent.

Ordered accordingly.

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THE PEOPLE ex rel. THE BOARD OF EDUCATION, Respondent, v.  
ANDREW H. GREEN, Comptroller, etc., Appellant.

(Argued June 20, 1876; decided September 19, 1876.)

THIS case presented the same question and was decided upon authority of *People ex rel. v. Tappan (supra)*.

*D. J. Dean* for the appellant.

*William Herring* for the respondent.

FOLGER, J., reads for reversal of order of General Term and affirmance of order of Special Term.

All concur; ANDREWS, J., absent.

Ordered accordingly.

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JAMES V. SCHENCK, Survivor, etc., Respondent, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

(Submitted June 20, 1876; decided September 19, 1876.)

THIS case presented the same question as *Schenck v. The Mayor, etc.* (*ante*, p. 44), and was disposed of on the authority of that case. As to some of the accounts set forth in the complaint and allowed by the referee, however, the court held there was no evidence to sustain the finding of the referee.

*J. C. Carter* for the appellant.

*A. C. Ellis* for the respondent.

EARL, J., reads for reversal and new trial unless plaintiff stipulates to reduce recovery for damages to \$3,104, in which event judgment as so modified affirmed.

All concur; ANDREWS, J., taking no part.

Judgment accordingly.

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ELLIOTT C. COWDIN et al., Respondents, v. ALFRED TEAL, Appellant.

Upon appeal to this court from an order under subdivision 4 of section 11 of the Code, an undertaking is necessary.

(Argued June 20, 1876; decided September 19, 1876.)

THIS was a motion to dismiss, for want of an undertaking, an appeal from an order of General Term affirming an order of Special Term referring this action. *Held*, as above.

*J. D. Taylor* for the motion.

*H. A. Southworth* opposed.

*Per Curiam mem.* for granting motion.

All concur.

Appeal dismissed.

ANN A. HEMANS, Respondent, *v.* THE NEW YORK STATE  
LIFE INSURANCE COMPANY, Appellant.

(Submitted June 20, 1876; decided September 19, 1876.)

*Geo. F. Comstock* for the appellant.

*W. E. Hughitt* for the respondent.

Agree to affirm. No opinion.

All concur; ANDREWS, J., absent.

Judgment affirmed.

876 688  
120 688

THE PEOPLE *ex rel.* WALTER GRAY *et al.*, Appellants, *v.*  
MARCUS H. PHILLIPS *et al.*, Respondents.

Although there may be no statutory limitation of time for bringing a common-law *certiorari*, the writ and proceedings based upon it have no office to perform when there is no legal right that can be enforced or protected by it.

Under the provisions of the act authorizing the bonding of certain towns in aid of the Lake Ontario Shore Railroad (chap. 811, Laws of 1868; amended by chap. 241, Laws of 1869), proceedings for bonding the town of Y. were completed and the requisite papers filed in the office of the county clerk August 25, 1870. The commissioners of the town, acting thereon, subscribed for stock in November, 1871, and in May, 1872, paid for the same by delivering town bonds to the full amount. During that year the board of supervisors of the county made provision by tax for payment of the interest for the ensuing year, and a semi-annual installment was paid in April, 1873. The relators, tax-payers

of said town, in August, 1873, proceeded by a common-law writ of *certiorari*, directed to the county clerk, the commissioners and assessors, to review their proceedings and the General Term affirmed the proceedings. *Held* (EARL, J., dissenting), that the assessors, whose official action alone it could be at all important to review, were in all matters brought up by the writ *functus officio* when it was issued, and their powers and duties could not be revived, or their action nullified so as to affect the rights or title of holders of the bonds, or the liability of the town thereon by any judgment upon the writ; that the relators had no rights which could be affected by any such judgment; and that the writ should have been quashed; but, as the judgment of affirmance was for all practical purposes a nullity, that an appeal therefrom brought up nothing for review, or upon which a judgment could be given enforceable by execution, and therefore that the appeal should be dismissed.

Also, *held*, that under said statute it was in the application to the county judge for the appointment of commissioners, if anywhere, that it should be made to appear that the town was "situate along the route" of said railroad, the duty of the assessors being limited to the examination of the consents, and determining whether the requisite number of tax-payers had assented to bonding the town; and as said application was not before the court, or the title of the commissioners challenged, the question as to whether there was a defect in showing the location of the town was not presented.

*People ex rel. v. Morgan* (55 N. Y., 587) distinguished.

(Argued September 18, 1876; decided September 26, 1876.)

THIS was an appeal from judgment of General Term of the Supreme Court in the fourth judicial department affirming the proceedings of defendants, the assessors of the town of Yates, Orleans county, the county clerk of said county and the commissioners of said town, in the matter of bonding of said town in aid of the Ontario Lake Shore railroad, which proceedings were brought up for review upon common-law *certiorari*. The facts and the holdings of the court are sufficiently set forth in the head-note.

*Geo. F. Danforth* and *I. M. Thompson* for the appellants.

*A. Perry* for the respondents.

ALLEN, J., reads for dismissal of appeal. FOLGER, ANDREWS and MILLER, JJ., concur. EARL, J., was for affirmance. CHURCH, Ch. J., took no part. RAPALLO, J., absent.

Appeal dismissed.



*James C. Carter* v. *Wheeler H. Packard* & *Arthur Walter*,  
 Appellants.

Argued December 12, 1927. Decided December 28, 1927.

*James C. Carter* for the appellants.

*Wheeler H. Packard* and *Arthur Walter* for the respondents.

*James C. Carter* for the appellants.  
*Wheeler H. Packard* and *Arthur Walter* for the respondents.

*James C. Carter* v. *Wheeler H. Packard* & *Arthur Walter*,  
 Appellants.

Argued December 12, 1927. Decided December 28, 1927.

THE UNITED STATES SUPREME COURT, sitting as a court of appeals, affirmed the judgment of the district court in *James C. Carter v. Wheeler H. Packard & Arthur Walter*, 1927, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

*Wheeler H. Packard* for the appellants.

*James C. Carter* for the respondents.

*Per Curiam* opinion for reversal and new trial.

All concur.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents, *v.*  
JAMES SCOTT, Impleaded, etc., Appellant

Defendant, R., having been arrested on a charge of abandoning his family, gave, with defendant, S., as his surety, a recognizance for his appearance before the justice on a day specified, "and from time to time as directed by the said justice." In an action upon the recognizance, it appeared that, after several adjournments, R. did not appear upon two days to which the proceedings were adjourned, and the justice ordered the recognizance forfeited. *Held*, that the evidence did not show a breach of the condition; that R. was not required thereby to appear upon any and every adjourned day, but only when directed by the justice; that there could be no continuance of the liability after the day named, if it was capable of being continued at all, but by a proper order of the justice directing the principal to appear at a specified time; that no such order could be implied from the mere adjournment, and in the absence of proof thereof defendants were not liable.

(Submitted September 20, 1876; decided October 3, 1876.)

THIS action was brought to recover the penalty of a recognizance or bail bond. Defendant Rowe was arrested upon a justice's warrant on the charge of abandoning his family. The recognizance in suit was conditioned for his appearance before the justice July 3, 1874, at 9½ o'clock A. M., "and from time to time as directed by said justice." The hearing was adjourned from time to time, entry thereof only being made upon the recognizance. Upon August 12, 1874, and September 8, 1874, adjourned days, Rowe did not appear, and, upon the last day, the justice indorsed upon the recognizance as follows: "The within-named Joseph E. Rowe called in open court and failed to appear. Ordered, that the within bond be, and the same hereby is, forfeited, and direct that the same be prosecuted according to law." It did not appear that any court was held or proceedings had on July 3, 1874, the day named in the recognizance, or that on that day, or any of the adjourned days, the justice made any order or gave any directions, verbal or otherwise, for the appearance of Rowe. *Held*, as above.

*H. C. Place* for the appellants.

*Jerry A. Wernburgh* for the respondents.

ALLEN, J., reads for reversal and new trial.

All concur.

Judgment reversed.

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DAVID GRAHAM, Respondent, *v.* THE FLUSHING AND NORTH  
SIDE RAILROAD COMPANY, Appellant.

(Argued September 21, 1876; decided October 8, 1876.)

*Edward E. Sprague* for the appellant.

*Samuel Hand* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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MARY E. JOBES, Respondent, *v.* THE NEW YORK AND  
HARLEM RAILROAD COMPANY, Appellant.

(Argued September 20, 1876; decided October 6, 1876.)

*W. A. Beach* for the appellant.

*E. H. Benn* for the respondent.

Agree to affirm on opinion of court below.

All concur; ALLEN and RAPALLO, JJ., taking no part.

Judgment affirmed.

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THEODORE M. DAVIS, as Receiver, etc., Respondent, *v.* WIL-  
LIAM DURYEA, Appellant.

(Argued September 27, 1876; decided October 6, 1876.)

THIS action was upon a bond similar to that in *Davis v. Copeland* (*ante*, p. 127), save that the limitation as to time was that the obligee should not be liable for any discounts made,

etc., "or any other matters or things transpiring after the expiration of one year from the date" of the bond. *Held*, as in that case, that paper discounted before the expiration of the year, but not maturing until thereafter, was included.

*Joseph J. Marrin* for the appellant.

*George E. Sibley* for the respondent.

MILLER, J., reads for affirmance.

All concur.

Judgment affirmed.

JOHN J. WEBER, Respondent, v. THE NEW YORK CENTRAL  
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

(Argued September 28, 1876; decided October 6, 1876.)

THIS action was brought to recover damages for injuries sustained by a collision with a train on defendant's road, at a street crossing in Buffalo. The case upon a former appeal is reported in 58 New York, 451. *Held*, as there, that, under the circumstances, the fact that a bell was rung and a light was carried on the top of the rear end of the train was not sufficient to acquit the defendant of the charge of negligence.

Some witnesses who were in a position to have seen or heard the bell ringing testified that they did not hear it ring; others testified that it did ring. The court stated, in its charge to the jury, that it had no doubt that the signals were given as testified to; but when asked to charge that it was their duty to find that the bell was rung refused to charge otherwise than it had done. *Held*, no error. (*Salter v. U. and B. R. R. Co.*, 59 N. Y., 631; *Hackford v. N. Y. C. and H. R. R. Co.*, 53 id., 654.)

Plaintiff's testimony was to the effect that on approaching the crossing he stopped and listened; that he heard no bell or whistle or rumble of a train in motion or any thing threaten-

ing and then went on. The court, after giving to the jury the law as laid down on the former appeal, asked them the following questions: Are you satisfied that when the plaintiff's horses reached the fourth track where the accident happened he could have seen the approaching train, and ought he to have looked? Was it negligence in him not to have looked? And could he have stopped in time to have avoided injury? The defendant's counsel thereafter requested the court to charge that if plaintiff could have, by the ordinary use of his faculties, ascertained the approach of a train before he reached the fourth track, and in time to have avoided it, his omission to do so was negligence. The court declined to charge further than it had already. *Held*, no error; that an omission to look, at the point named, under the circumstances, would not have been, as matter of law, negligence.

*James M. Willett* for the appellant.

*George Wadsworth* for the respondent.

FOLGER, J., reads for affirmance.

All concur.

Judgment affirmed.

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WILLIAM BORDEN, Respondent, *v.* THE SOUTH SIDE RAILROAD  
COMPANY OF LONG ISLAND, Appellant.

(Argued September 29, 1876; decided October 6, 1876.)

MEM. of decision below, 5 Hun, 184.

*E. B. Hinsdale* for the appellant.

*Amasa J. Parker* for the respondent.

Agree to affirm. No opinion.

Judgment affirmed.

CHARLES E. HORTON, Respondent, v. SAMUEL H. PALMER,  
Appellant.

(Argued September 29, 1876; decided October 6, 1876.)

*D. W. Guernsey* for the appellant.

*Robert E. Taylor* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

JANE A. LAKE, Respondent, v. JOHN J. NATHANS, Appellant.

(Submitted September 29, 1876; decided October 6, 1876.)

THIS action was brought to have the assignment of a bond and mortgage, executed by plaintiff to defendant as collateral security for a loan, given up and canceled on the ground of usury. Decided on the facts in the case.

*George W. Sandford* for the appellant.

*W. I. Butler* for the respondent.

ALLEN, J., reads for affirmance of order granting a new trial, and for judgment absolute; CHURCH, Ch. J., MILLER and EARL, JJ., concur; FOLGER, RAPALLO and ANDREWS, JJ., not voting.

Order affirmed and judgment accordingly.

On motion for reargument in above cause, it was claimed that judgment should have been modified and defendant allowed to retain the mortgage for a portion of the debt secured, which it was alleged was not affected by the usury. *Held*, that if defendant was right in this claim, he should have gone back for a new trial, instead of appealing from the order granting it, as this court could only affirm or reverse the order

granting a new trial ; and, a new trial having been properly granted, the order was necessarily affirmed, and judgment absolute given.

All concur.

Motion denied.

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CHARLES DEVLIN, Appellant, *v.* THE MAYOR, ALDERMEN AND  
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued October 3, 1876; decided October 6, 1876.)

*Joseph J. Marrin* for the appellant.

*Samuel Hand* for the respondent.

All concur for dismissal of appeal. No opinion.

Appeal dismissed.

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PHINEAS W. SPRAGUE, Respondent, *v.* THE WESTERN UNION  
TELEGRAPH COMPANY, Appellant.

(Argued October 4, 1876; decided November 14, 1876.)

*George W. Soren* for the appellant.

*Edward D. McCarthy* for the respondent.

Agree to affirm on opinion of DALY, Ch. J., in court below.

All concur ; FOLGER, J., not sitting.

Judgment affirmed.

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EDGAR HOLMES, Appellant, *v.* THE FARMERS' JOINT STOCK  
INSURANCE COMPANY, Respondent.

(Argued September 19, 1876; decided November 14, 1876.)

*J. C. Cochrane* for the appellant.

*J. A. Stull* for the respondent.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

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WILLIAM H. SEYMOUR et al., Respondents, *v.* THE RUSSELL & ERWIN MANUFACTURING COMPANY, Impleaded, etc., Appellant.

(Submitted September 29, 1876; decided November 14, 1876.)

THIS was an action, among other things, upon a bill of exchange drawn upon defendant, the Russell & Erwin Manufacturing Company, and accepted in its name by its agent. The principal defence was want of authority in the agent. The court held that the evidence was sufficient to show a ratification by defendant with knowledge of the material facts, and so did not consider the question of actual authority.

*L. C. Ashley* and *B. F. Thurston* for the appellant.

*Henry R. Selden* for the respondents.

*Per Curiam* opinion for affirmance.

All concur.

Judgment affirmed.

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LUTHER E. WILSON et al., Respondents, *v.* HENRY S. EDWARDS, Appellant.

(Argued September 29, 1876; decided November 14, 1876.)

THIS was an action upon a contract of suretyship, by which defendant became surety for the faithful performance by one Van Vrankin of his duties as agent of plaintiffs under a written contract, by which he was employed to sell hay and other



produce on commission. The case has been once before to this court and was decided by the Commission of Appeals. (See Mem., 61 N. Y., 659.) The prominent point presented, *i. e.*, as to the construction of the contracts, was the same as there determined. The court *held*, that the former decision was final and conclusive, as the evidence was substantially the same as on the former trial.

By defendant's contract he agreed, in case of default on the part of Van Vrankin in paying over the proceeds of sales, that he would make good the default and pay any deficiency, on condition that demand be first made of Van Vrankin and notice of deficiency given to defendant. It also provided that "in case Van Vrankin should, without bad faith on his part, make sales of hay to a party or parties from whom payment cannot be obtained by him, then he is not to be held liable for the first carload so sold to any such party on which payment should be lost." The alleged default was in the non-payment of the proceeds of the sale of thirteen carloads of hay. Defendant's counsel moved for a nonsuit on the ground, among others, that there was no evidence that Van Vrankin had received any money for the hay when notice was given defendant of his default. The motion was denied. *Held*, no error; that the liability of defendant was not limited to a default by Van Vrankin in accounting for and paying over money received by him; that the clause quoted showed that Van Vrankin was to be responsible, for and made defendant surety for sales not coming within the exception stated.

*S. W. Jackson* for the appellant.

*E. W. Paige* for the respondent.

ANDREWS, J., reads for affirmance.

All concur except MILLER, J., not voting. RAPALLO, J., absent.

Judgment affirmed.

WILLIAM H. BOOTH, Respondent, *v.* THE BOSTON AND ALBANY  
RAILROAD COMPANY, Appellant.

(Argued October 2, 1876; decided November 14, 1876.)

THIS action was brought to recover damages for injuries sustained by plaintiff, whilst an employe of defendant, by a collision on its road.

The collision by which plaintiff was injured was the same as that which killed Sipperly, a fireman, for whose death a recovery was sustained (see *Flike v. B. and A. R. R. Co.*, 53 N. Y., 549), and Sprong, the brakeman, for whose death a recovery was sustained in *Sprong v. Boston and Albany Railroad Company* (58 N. Y., 56).

In this case the cause was submitted to the jury with instructions to find for the plaintiff if, upon the evidence, they should find the defendant guilty of negligence causing or contributing to the injury in any one of these three particulars: First, in dispatching the train preceding that upon which plaintiff was injured without the proper and sufficient number of brakemen; second, in dispatching it with defective or insufficient breaks; third, in sending the train upon which plaintiff was engineer to follow too quickly the preceding train. In respect to the last two alleged acts of negligence the court was asked, but refused, to charge that there was no evidence upon which the jury would be justified in finding negligence. The verdict was general. *Held*, that the refusal to charge as to the third act or ground of negligence was error, as there was no evidence tending to prove that proper care and caution and ordinary prudence was not exercised; indeed, there was no evidence of the time that did actually elapse between the departure of the two trains; and as it did not appear upon what ground of negligence the jury found against plaintiff, and there being no evidence upon one of the points suggested, the error was one for which a new trial must be granted.

*George W. Miller* for the appellant.

*Matthew Hale* for the respondent.

ALLEN, J., reads for reversal and new trial.

All concur.

Judgment reversed.

---

ELBERT W. COOK, et al., Appellants, v. THE WARDENS AND  
VESTRY OF ST. PAUL'S CHURCH, HAVANA, Respondent.

(Argued October 4, 1876; decided November 14, 1876.)

THIS was an action of ejectment to recover certain premises conveyed by plaintiffs and others, heirs at law of Charles Cook to the defendant. (Reported below, 5 Hun, 293.)

The deeds contained certain conditions subsequent, and plaintiffs sought to recover because of breach of said conditions. The referee found that after the breach plaintiffs, without objection, permitted defendant to expend \$901 in repairs upon the premises. They also joined with defendant in effecting a sale of part of the premises, receiving to their own use the purchase-money therefor, and have joined the defendant, or one of them has, in the use of the premises for religious worship. *Held*, that plaintiffs had waived the forfeiture, if any occurred (*Hooper v. Cummings*, 49 Me., 389; *Andrews v. Senter*, 35 id., 394); also, that the evidence of waiver having been received without objection, it could not be objected on appeal that no issue of waiver was made in the pleadings. (*McKeehie v. Ward*, 58 N. Y., 541.)

*J. McGuire* for the appellants.

*M. M. Mead* for the respondent.

FOLGER, J., reads for affirmance.

All concur.

Judgment affirmed.

STEPHEN B. BARTEAU, Executor, etc., Appellant, v. THE PHOENIX MUTUAL LIFE INSURANCE COMPANY OF HARTFORD, Respondent.

67	596
122	257
67	596
131	498

To avoid a policy of life insurance upon the ground of misrepresentation, it must, in the absence of fraud, be in respect to some circumstance or fact material to the contract, and by which the insurer is induced to undertake the risk.

A warranty, however, must be literally true, whether the fact warranted be material or not.

In case of a warranty, therefore, the question, how far the fact was or was not material, is not to be considered.

Knowledge on the part of the agent of a life insurance company of the falsity of a warranty will not relieve the assured from a forfeiture of the policy.

(Argued November 15, 1876; decided November 28, 1876.)

THIS action was upon a policy of life insurance.

The policy contained a provision that, in case any of the statements or declarations made in the application shall be found in any respect untrue, the policy shall be void, and in the application the applicant stated that he was aware that any untrue answers to the interrogatories making a part of the application would vitiate the policy and forfeit all payments under it. One of the interrogatories was whether the applicant had had certain specified diseases, among others paralysis, to which he answered "no." Held, that the provision of the policy and the statement in the application made this a warranty, but that it was immaterial whether it be considered a warranty or not, if treated as a mere representation it was one material to the risk, and if untrue avoids the policy; the court stating the rule as above, citing Bunyan on Life Insurance (page 31), *Higbee v. Guardian Mutual Insurance Company* (53 N. Y., 603), *Chase v. Hamilton Insurance Company* (20 N. Y., 52).

Also held, that knowledge of the agent of the company of the falsity of the warranty would not relieve the insured or his representatives from the consequence of a breach. (*Chase v. Hamilton*, 20 N. Y., 52; *Ripley v. Aetna Insurance Company*, 30 id., 136; *Brown v. Cattaraugus Mutual. Ins. Com-*

*pany*, 18 id., 387; *Fort v. Aetna Life Ins. Company*, 61 id., 571.)

The residue of the opinion was taken up with a discussion of the evidence, the court holding that, by it, the fact that the insured had had paralysis prior to the application, was so clearly established that a verdict for defendant was properly directed.

*R. E. Andrews* for the appellant.

*Samuel Hand* for the respondent.

ALLEN, J., reads for affirmance.

All concur.

Judgment affirmed.

MAURICE GINNA, Administrator, etc., Respondent, *v.* THE  
SECOND AVENUE RAILROAD COMPANY, Appellant.

67 596  
114 619

Where a street railroad car is so crowded that, although it may not be physically impossible for one taking passage to enter it, yet that he cannot do so without great and unreasonable discomfort to himself and to the prior occupants of the car, and the conductor consents to, and does, accept from him the usual fare without insisting upon his finding a place within the car, and while riding upon the platform he is thrown off and injured by the negligence of the company or its employes, the fact that he was standing upon the platform does not of itself constitute contributory negligence; but it is a question for the jury.

So, also, it is not negligence *per se* for one riding upon the platform of the car to omit to take hold of the iron bar or rail to prevent being thrown from the platform.

Exceptions will not lie to the language of the judge in giving instructions to a jury, unless it is such as to convey a wrong impression, or to mislead as to the law of the case.

(Argued November 20, 1876; decided November 28, 1876.)

THIS was an action to recover damages for the alleged negligent killing of John Ginna, plaintiff's intestate. (Reported below, 8 Hun, 494.)

The deceased got on to one of defendant's cars, which, as defendant's driver testified, was crowded inside. He looked in. There was a lady standing against the door. He then

turned and stood upon the platform with his back to the car. Three or four other passengers also stood upon the platform. The conductor, in collecting fares, instead of going through the car, had to pass around on the outside to the front platform. The deceased paid his fare. In consequence of a switch having been left open, the car ran off upon it, producing a violent jolt or shock, which threw off most of the persons riding upon the platform, and among them the deceased, who was so injured that he subsequently died. Defendant's counsel moved on the trial to dismiss the complaint on the ground of contributory negligence, which motion was denied. No question was made upon the appeal as to defendant's negligence. The court held as above, citing *Clark v. Eighth Avenue Railroad Company* (36 N. Y., 135); *Willis v. Long Island Railroad Company* (34 id., 670); *Spooner v. Brooklyn City Railroad Company* (54 id., 230); *Edgerton v. New York and Harlem Railroad Company* (39 id., 227). Several exceptions were made to the forms of expression and to some irrelevant remarks of the judge in his charge. The submission of the questions in the case to the jury and the statement of the principles of law by which they were to be governed were substantially correct. *Held*, that an exception would not lie.

The court instructed the jury that they had the right to infer "that the deceased was holding on to the iron to keep on to the platform." There was no evidence upon that point. *Held*, error; but that the error was harmless, as the fact was immaterial; that, whether or not he took hold of the iron did not affect the question of negligence. It was not negligence *per se* for the deceased to omit to avail himself of the iron bar.

*Austen G. Fox* for the appellant.

*O. P. Buel* for the respondent.

ALLEN, J., reads for affirmance.

All concur.

Judgment affirmed.

WILFRED VAN WART et al., Respondents, v. CHARLES STILL-  
MAN, Appellant.

(Argued November 21, 1876; decided November 28, 1876.)

*James R. Cox* for the appellant.

*William A. Jenner* for the respondents.

Agree to dismiss appeal. No opinion.

All concur.

Appeal dismissed.

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JAMES McLEAN et al., Respondents, v. CHARLES HEALD,  
Appellant.

(Argued November 21, 1876; decided November 28, 1876.)

*John A. Godfrey* for the appellant.

*James Dunne* for the respondents.

Agree to affirm on opinion below. All concur.

Order affirmed.

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#### ANONYMOUS.

In the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause wide-spread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders.

A banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, *i. e.*, to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business.

(Argued November 21, 1876 ; decided November 28, 1876.)

THIS was an appeal from an order of General Term affirming an order of Special Term, which denied a motion on the part of defendants to vacate an order of arrest.

The order of arrest was based upon the provision of the Code (§ 179, sub. 4), authorizing an arrest "when defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought." The affidavits upon which the order of arrest was granted, showed substantially that defendants had for a number of years been doing an extensive business as banker, living in great style, having a large banking-house and many employes, and that they were reputed to be very wealthy. Plaintiffs had been doing business with them for several years, believing them to be perfectly responsible. Plaintiffs purchased of them a sight draft on a London bank; at the time defendants were hopelessly insolvent, their assets being only sufficient to pay about forty per cent of their indebtedness. This condition of affairs was known to them. Seven days after the draft was purchased defendants closed their doors and made an assignment. The draft was presented and payment refused. Defendants did not show what capital, if any, they had in their business, or by what disaster they became so largely insolvent, nor what reasons, if any, they had to hope they could continue on in their business. *Held*, that the order of arrest was properly granted, the court stating the principle as above.

Defendants' affidavits showed that when the draft was sold they had a large amount of money on deposit in the London bank. Before, however, the draft reached London, this deposit had been exhausted by prior drafts and letters of credit, and defendants had become largely indebted to the drawer. *Held*, that the fact of the deposit did not relieve defendants, and was of no importance.

The court say :

"This is not like the case of a trader who has become embarrassed and insolvent and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit making no false representations, without the necessary imputation of dishonesty. (*Nichols v. Pinner*, 18 N. Y., 295; *Brown v. Montgomery*,



20 id., 287; *Johnson v. Morrell*, 2 Keyes, 655; *Chambers v. Fort*, 2 Lans., 81.) But it is believed that no case can be found in the books holding that a trader who was hopelessly over-extended, knew that he could not pay his debts and that he must fail in business and thus disappoint his creditors. It is not honestly take advantage of a credit induced by his apparent prosperity and thus obtain property which he had no reason to believe he could never pay for. In such a case the act does an act the necessary result of which will be to cheat and defraud another and the intention to cheat will be inferred.

*Samuel Hand* for the appellants.

*Henry H. Morange* for the respondents.

EARL, J., reads for affirmance.

All concur; ALLEN, FOLGER and RAPALLO, JJ., concurring in result.

Order affirmed.

HIRSH V. BAYLIS, Appellant, v. HENRY G. SCUDDER et al,  
Respondents.

(Argued November 21, 1876; decided November 28, 1876.)

*J. Lawrence Smith* for the appellant.

*Henry C. Platt* for the respondents.

MEM. of decision below, 7 Hun, 308.

Agree to affirm. No opinion.

All concur.

Order affirmed.

MARY WHITE, Respondent, v. CHARLES HICKMAN, Executor,  
etc., Appellant.

(Argued November 23, 1876; decided December 5, 1876.)

*Nathaniel C. Moak* for the appellant.

*John A. Godfrey* for the respondent.

Agree to affirm. No opinion.  
Judgment affirmed.

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WILLIAM SIEGER, Executor, etc., Appellant, v. JOHN Y.  
CULYER, Respondent.

(Argued November 23, 1876; decided December 5, 1876.)

*James H. Gilbert* for the appellant.

*N. H. Clement* for the respondent.

Agree to affirm order granting new trial, and judgment  
absolute against plaintiff, on opinion of court below.

All concur.

Order affirmed and judgment accordingly.

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GEORGE ZIMMER, Administrator, etc., Respondent v. THE NEW  
YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,  
Appellant.

DISPOSED of on the facts in the case. (Reported below, 7  
Hun, 552.)

*M. W. Cooke* for the appellant.

*Geo. E. Ripsom* for the respondent.

*Per Curiam mem.* for affirmance.

All concur, except ALLEN, J., not voting.

Judgment affirmed.

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WILLIAM MACAULEY, Respondent, *v.* THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

Plaintiff drove his horse and cart upon a pier, one-half of which belonged to the city, and which it had suffered to become out of repair and unsafe for use. There was a hole in defendant's half of the pier, through which the horse saw and heard the rush of the water, and being frightened, so that plaintiff was unable to control him, backed the cart against the string piece at the edge of the pier; this, being decayed, gave way, and horse and cart fell into the water and were lost. There was no evidence that the horse was unusually vicious or excitable. In an action to recover damages, *held*, that the fact that the horse became frightened did not, under the circumstances, preclude a recovery; that a horse was not to be considered uncontrollable because it shies or is momentarily beyond control of the driver; and, as the cause of the fright was occasioned by the negligence of the defendant, the question was one for the jury.

*Titus v. Inhabitants of H.* (97 Mass., 258), *Horton v. City of T.* (id., 266), *Fogg v. Nahant* (98 id., 578) distinguished.

(Argued November 27, 1876; decided December 12, 1876.)

THIS was an action to recover damages for the loss of plaintiff's horse and cart.

Plaintiff, in his business as cartman, drove upon a pier, one-half of which belonged to the city, to remove some stone. Defendant had suffered its half of the pier to become out of repair and unfit and unsafe for use. There was a hole in defendant's half of the pier, through which the horse caught sight of the water, and, frightened by its surging, shied and backed. There was a string piece at the edge of the pier, but dirt had accumulated against it, and the string piece itself was decayed and rotten, so that, when the cart struck it, it gave way and the horse and cart went overboard and were lost.

Defendant claimed to be relieved from liability because of contributory negligence upon the part of the plaintiff, and by

the fact that the accident was primarily caused by the fright of the horse.

Upon the question of contributory negligence, the court held that the evidence required its submission to the jury. The portion of the opinion upon the other question is as follows :

"Second. The testimony as to the conduct of the horse is, that he got a little restless and frightened at the surge of the water through the hole in the pier, that he shied back a little, and backed the cart against the string piece, the while the plaintiff was unable to control and stop him. The string piece was of less use to resist the action of the horse from the falling of dirt at the side of it, and of no use in stopping him from the rottenness of it. There is nothing apart from this to show that this was not an animal fit to be used in the streets, upon the piers and in other public places and ways of New York city. It is not shown, that the plaintiff would not have been able, in a reasonable time after the horse began to shy and back, being frightened by the noise and motion of the water seen and heard by him through the hole in the dock, to have checked and controlled him. All that is shown is, that becoming scared from the cause mentioned, he backed against the string piece, which from defects in and about it, did not serve the purpose of it, and the cart passed through it or over it, and dragged the horse with it into the water.

"Upon this state of facts, the court at trial was asked to rule, that the plaintiff could not recover. The legal proposition asserted by the defendant, as a basis for the ruling asked, was that this state of facts, showed that this horse by fright, had become actually uncontrollable, so that the plaintiff could not stop him, nor exercise or regain control over his movements, and that in that condition, he came upon the defective string piece which occasioned the injury, and that the injury would not have happened unless he had become so uncontrollable. It is not necessary for us to consider whether this proposition is sound, or whether it is sustained by the authorities cited by defendant, viz. : *Titus v. Inhabitants of Northbridge* (97 Mass., 258) ; *Horton v. City of Taunton* (id., 266, note) ; *Fogg v. Nahant* (98 id., 578). The proposition does not

contain quite an important limitation of it, made by the first of those cases, to wit: that a horse is not to be considered uncontrollable, that merely shies or starts, or is momentarily not controlled by the driver. The testimony in the case in hand did not conclusively exclude the possibility of this element. The sight and hearing of the water was through the hole near the center of the pier, but on the defendant's half of it. The position of the horse and cart as to this hole and to the edge of the pier, the distance which he backed before hitting the string piece; the degree of the fright which was upon him, and the vigor and length of continuance of the exertion of the plaintiff to manage and restrain him, up to the time that the weight of the cart dragged him over, were all proper to be considered in determining the question whether it was a mere shy or start, and whether the loss of control over the horse was momentary. If there was not explicit evidence in the case, to all of these points, there was some, and from that inferences could be made. It is certain that there was not that evidence of the habits and character of the animal, nor of the length of time during which the plaintiff strove in vain to restrain him, nor of the greatness of the space over which the horse moved in backing, to show so conclusively to the court, that the case was out of the limitation above given, as that the court could say as matter of law, that the unlimited proposition propounded by the defendant was a legal result from all the facts and permissible inferences. It was a question for the jury. Besides this, there is an important fact in this case, which does not appear in the cases cited above. The cause of the fright of the horse was one occasioned by the negligence of the defendant. The square hole open in the surface of the pier was not a proper state of the structure. It was the effect of the rush of water as seen and heard through this that excited the horse. It is not shown, nor to be inferred, that he was vicious or unusually excitable. A court might not infer that the same cause would not have had the same effect upon most horses of ordinarily kindness and quiet of temper. It was not to be said that it was any peculiar trick or vice of the horse, or any awkwardness or inex-

perience, or want of skill, of the plaintiff, that caused the temporary loss of control. The natural inference is, that it was the commotion of the water, seen and heard through the hole, which acted upon the natural qualities of the animal and made him so long insensible to the efforts of the plaintiff, generally sufficient to restrain him, as that the other defect in the pier, the insufficient string piece gave occasion for the injury. In the cases cited, the loss of control over the animal resulted from some cause existing in him, or in the lack of care of the driver, or in something which was not chargeable to the defendant as negligence. We are not called upon to express dissent from, or approval of, the principle upon which those cases were decided. They would seem to have been somewhat controlled by the provisions of the statute law of Massachusetts, and to find part of the *ratio decidendi*, in the fact that the loss of the control of the animal was not produced by any thing for which the defendant was responsible. (See *Southworth v. Old Colony and Newport Railway Co.*, 105 Mass., 342.)

"There were some requests to charge, which were refused by the court. One was, if the jury believe that the plaintiff's horse was so frightened at the time of the accident as to be beyond the control of the plaintiff, and that the accident happened after the driver had lost control, then the verdict must be for the defendants. It will be perceived that this proposition leaves out both of the elements upon which we have laid stress above. To have made the request conform to our views, as herein expressed, it should have asked also that the jury be told to find that the loss of control over the horse was not momentary, but continued, and that he was frightened by something for which the defendant was not negligently responsible. Omitting these, it stated a rule which the court could not give to the jury without error."

*A. J. Requier* for the appellant.

*Edward P. Wilder* for the respondent.

FOLGER, J., reads for affirmance.

All concur.

Judgment affirmed.

ALANSON ROBINSON, Respondent, *v.* GEORGE BRISBANE *et al.*,  
Appellants.

(Argued December 5, 1876; decided December 12, 1877.)

REPORTED below, 7 Hun, 180.

*Amasa J. Parker* for the appellants.

*Alvin Burt* for the respondent.

Agree to dismiss appeal on opinion of court below.

All concur. RAPALLO, J., absent.

Appeal dismissed.

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JOSEPH PRATT, Plaintiff in Error, *v.* THE PEOPLE OF THE  
STATE OF NEW YORK, Defendants in Error.

Where a judgment against the accused in a criminal action is reversed by the General Term upon writ of error, solely upon the ground of an irregularity therein, and in the sentence; and the proceedings are remitted to the trial court to pronounce a proper sentence and judgment, error will not lie to this court at the suit of the plaintiff in error below. He must await a final judgment, and for errors other than that upon which he succeeded he must seek his remedy, if any, by another writ of error.

(Submitted December 6, 1876; decided December 19, 1876.)

THIS was a motion to dismiss a writ of error.

Plaintiff in error was indicted and convicted in the Court of Sessions of Jefferson county for maintaining a nuisance in the public highway. The court adjourned to the office of the county judge, and sentence was there pronounced at the adjourned term.

Upon writ of error to the General Term the conviction was reversed and new trial granted, but upon motion of the district attorney the order of reversal was modified so as (instead of

granting a new trial) to direct that the record and proceedings be remitted to the Court of Sessions, to pronounce such judgment and sentence as might be lawful and proper. The order recited that the reversal was upon the ground that the sentence was illegal and void because pronounced at an adjourned day at the office of the county judge; that no other question was discussed or passed upon. To review this order error was brought by the accused. *Held*, as above.

*Watson M. Rogers* for motion.

*Stephen R. Pratt* opposed.

*Per Curiam mem.* for dismissal of writ of error.

All concur.

Writ dismissed.

JOHN L. MELCHER et al., Executors, etc., Respondents, v. LUCY D. FISK, Executrix, etc., Appellant.

67 607  
127 425

(Argued November 6, 1876; decided December 19, 1876.)

A CLAIM was presented by plaintiffs as executors of the estate of Paran Stevens against the estate of defendant's testator for repairs and improvements alleged to have been made by Mr. Stevens in rooms leased by him to the city as an armory for the Ninth regiment, payment for which was guaranteed by Fisk. Among other items was one of \$2,500 for laying a new floor in the armory. The armory consisted of the third and fourth floors of buildings covering eight lots. Originally the buildings covered four lots. Mr. Stevens built on the adjoining four lots, and the improvements were in extending the armory so as to occupy the third and fourth floors of both buildings and putting down a new floor in the armory. The only question discussed in the opinion was as to whether the estate of Mr. Fisk was liable for the entire floor of the armory as enlarged, or only for the laying the floor



## MEMORANDA OF

The case depended upon the construction of the will of Mr. Stevens containing the

Mr. Hitchcock that it was not necessary to lay the floor of the old building, you will complete the same. If you will complete the same as proposed by Major Hitchcock I will guarantee that the amount of the same shall be paid to you."

The amount specified (\$2,500) proved to be an estimate, and the amount actually paid was less, indicating the limit of the

appellant.

appellants.

and new trial unless plain-  
\$1,250 and interest thereon  
plaintiffs so stipulate, judgment

appellant.

IN THE MATTER OF THE ESTATE OF OLIVER BESLEY TO VACATE  
AN ASSIGNMENT.

Argued December 22, 1876. Decided December 23, 1876.)

*Edgar C. Andrews* for the appellant.

*H. J. Dunn* for the respondent.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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THOMAS PICKETT, Plaintiff in Error, *v.* THE PEOPLE OF THE  
STATE OF NEW YORK, Defendants in Error.

(Argued December 15, 1876; decided December 22, 1876.)

*Peter Mitchell* for the plaintiff in error.

*Thomas S. Moore* for the defendants in error.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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FRANK WATSON, Plaintiff in Error, *v.* THE PEOPLE OF THE  
STATE OF NEW YORK, Defendants in Error.

(Argued December 15, 1876; decided December 22, 1876.)

*Peter Mitchell* for the plaintiff in error.

*Thomas S. Moore* for the defendants in error.

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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JOHN B. DOLAN, Appellant, *v.* THE MAYOR, ALDERMEN AND  
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued December 15, 1876; decided December 22, 1876.)

*Briggs & Fellows* for the appellant.

*D. J. Dean* for the respondent.

610      CAUSES NOT REPORTED IN FULL

Agree to affirm. No opinion.

All concur.

Judgment affirmed.

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THOMAS CONROY, Appellant, *v.* THE MAYOR, ALDERMEN AND  
COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued December 18, 1876; decided December 23, 1876.)

*Charles E. Wells* for the appellant.

*D. J. Dean* for the respondent.

Agree to affirm order and judgment absolute for defendant  
on stipulation. No opinion.

All concur, except CHURCH, Ch. J., dissenting.

Order affirmed and judgment accordingly.

## ERRATA.

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In *Matter of Second Ave. M. E. Church* (66 N. Y., 398), the word "effect," in the fourth line from top of page, should be erased and "affect" inserted.

In *Morthorst v. N. Y. C. and H. R. R. Co.* (66 N. Y., 609) insert after name of counsel for respondent, "Agree to affirm; no opinion; all concur."

In *People ex rel. v. Briggs* (50 N. Y., 554), in sixth line from top of page of head note, after the words "amendment to," insert "the charter of."



# INDEX.

## ACCOUNT STATED.

1. F., defendant's intestate, executed to P., plaintiff's testator, his bond, conditioned to pay \$6,763, in installments, with annual interest at six per cent. F. was the agent of P., and had in his hands this bond, with the other securities of his principal. F. annually computed the amount due upon the bond, compounding the interest, attaching each yearly computation to the bond, and entering it in a bond book kept by him as such agent. At the termination of F.'s agency, an account was stated between him and his principal, one item of which was the amount found due upon the bond, with interest so compounded; reckoning simple interest only, the payments made by F. upon the bond were more than sufficient to pay it in full. In an action upon the account stated, *held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that there was no promise or agreement to pay compound interest, as the statement of the account was but an admission of the correctness of the balance with interest compounded; that if one could be construed or implied from the account stated, there was no consideration to support the same; and that the claim could not be brought within the principle upon which compound interest is allowed upon the periodical statement of accounts between merchants. *Young v. Hill.* 162
2. Also *held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that the amount due upon the bond could not be recovered in an action as upon an account stated; that the action should have been brought upon the bond itself. *Id.*
3. The complaint set forth various alleged errors and omissions in the

agency account as stated. *Held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that, assuming the balance claimed to be due on the bond properly formed part of the account stated, as plaintiff sought to open and readjust the balance, the account was open to any objections on the part of the defendants. *Id.*

## ACTION.

Where, after the commencement, and during the pendency, of an action to foreclose a mechanic's lien, the lien expires, the action may still be prosecuted as a personal action, and a personal judgment may be rendered as in an ordinary action upon contract. *Glacius v. Black.* 563

— Amount due on bond not recoverable in action upon account stated.

*See Young v. Hill.* 162

## ACTS OF CONGRESS.

— As whether petition for removal of cause to United States Court under United States Revised Statutes, 113, section 639, should be verified, and what sufficient verification.

*See Shaft v. P. M. L. Ins. Co.* 544

## ADVERSE POSSESSION.

— When party taking by deed recognizing public right to use land as a highway cannot claim by.

*See Bridges v. Wyckoff.* 180

## AMENDMENT.

Certain judgment creditors of the owner of the equity of redemption were not made parties originally



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- denied solely upon the ground of want of power, and the General Term affirms the same without qualification, it affirms it in all its parts, including the ground upon which, by its terms, it was granted, and its order is appealable to this court. The order cannot be qualified by reference to the opinion of the court. *Hewlett v. Wood.* 394
19. In such case, if it is here determined that the court below erred in its decision as to power, the order will be reversed and the proceedings remitted to the court below for the exercise of its discretion. *Id.*
20. This court will not review a decision denying or vacating an order of arrest where, in any view of the facts, such decision can be upheld. *Liddell v. Paton.* 398
21. A petition of appeal from a surrogate's decree settling the accounts of an executor, allowing, among other things, a claim of the executor against the estate, of \$1,500, stated, as one ground of appeal, that the surrogate erred in adjudging that the estate was indebted, upon the proofs, to the executor for the sum so allowed. *Held*, that it was error for the General Term to decline to pass upon the sufficiency of the evidence to sustain the decree; and that, in reviewing the judgment of the General Term, it was the duty of this court to look into the testimony and to determine that question. *Kyle v. Kyle.* 401
22. Where a record on appeal to this court shows no error the court has no power to grant a new trial or rehearing. *In re Peugnet.* 442
23. A rehearing upon a motion or summary application can only be granted on reversal of an order. *Id.*
24. Where a judgment is for the recovery of a sum of money, to give a right of appeal to this court, under the amendment of 1874, to section 11 of the Code (chap. 322, Laws of 1874), the judgment must, in all cases, exceed \$500. *Roosevelt v. Linkert.* 447
25. The subdivision 4, added to section 11 of the Code in 1865, allowing an appeal from a decision of a motion which involved the constitutionality of a State law, was repealed by the amendment of said section in 1867, which added as subdivision 4 a new and different provision; the subdivision, as thus enacted, took the place of the same subdivision as it had previously existed. *Patten v. N. Y. C. R. R. Co.* 484
26. *It seems* that the subdivision so repealed did not apply to a decision of the New York Common Pleas. *Id.*
27. The petitioner filed his petition under chapter 338, Laws of 1858, asking to vacate an assessment for a local improvement in the city of New York. The prayer of the petition was granted by the Special Term, but the order thereon was subsequently vacated by a Special Term order, which was affirmed by the General Term. No order was made, however, denying the prayer of the petition. *Held*, that the General Term order was not appealable under subdivision 3 of section 11 of the Code, as it was not a final order; that the result of the order was to leave the petition undisposed of and ready to be brought again to a hearing. *In re Moore.* 555
28. Upon appeal to this court from an order under subdivision 4 of section 11 of the Code, an undertaking is necessary. *Cowdin v. Teal.* 581
- *When exception insufficient to present question on.*  
*See Wooster v. Sage.* 67
- *When error in charge on subject of damages for negligence not cured by verdict for defendant.*  
*See Jutte v. Hughes.* 268
- *When error in ruling not ground for reversal on.*  
*See Bennett v. Lyc. M. Ins. Co.* 274
- *Objection not taken on trial not available on; so, also, refusal of referee to allow amendment of answer.*  
*See P. W. Co. v. Badger.* 294

— *When view not taken by trial court, and resting on facts, not found, but supported by the evidence, may be taken to sustain judgment.*

*See Arnot v. Erie R. Co.* 815

— *Order in discretion of court not reviewable here.*

*See Travis v. Myers.* 543

— *Appeal will be dismissed when judgment below is a nullity.*

*See People ex rel. v. Phillips. (Mem.)* 582

— *On affirmance of order granting a new trial, court has no power to modify a judgment.*

*See Lake v. Nathans. (Mem.)* 589

— *Question not raised on trial cannot be raised on.*

*See Cook v. Wardens, etc. (Mem.)* 594

### ARREST.

1. If an order of arrest is granted in a case not authorized by the Code, or where the affidavits fail to establish one of the specified causes of arrest, the order may be reviewed in this court; but where the granting of the order depends upon the credibility of witnesses, or upon inferences to be drawn from circumstances as to which intelligent men may fairly differ, the general rule of this court is to follow the conclusions of fact of the court below *Wright v. Brown.* 1

2. As to whether the court has power to review the merits of the order upon the facts, *quære.* *Id.*

3. The alleged ground for an order of arrest was fraud on the part of defendant, in contracting a debt for the purchase-price of 6,000 bushels of malt. The affidavits disclosed that defendant was a brewer; he gave his notes for the malt at two, three and four months. Defendant was, at the time, indebted to his wife about \$75,000, and to others about \$55,000, a portion of which was in suit and liable at any time to go into judgment. His property was all personal, worth about \$20,000. The notes were given January eighth; on the fourteenth he borrowed of his brother \$9,000, giving a chattel mortgage on all his property, ex-

cept the malt so purchased; on the fifteenth, he borrowed of another person \$4,500, on 5,000 bushels of the malt; on the eighteenth, he sold all his property, except the malt, to his wife, subject to the mortgage, the purchase-price being applied upon his indebtedness to her; and on February eighth he sold to her the malt, subject to the loan, the balance being applied in the same manner, and stopped business. Defendant's affidavit set forth facts tending to explain these circumstances, and alleged that he intended to continue in business and to pay for the malt when he purchased. No false representations were claimed to have been made by him, and no act or device was resorted to, to deceive plaintiff. Defendant was solicited to purchase, and urged to increase the amount beyond what he desired to purchase. *Held* (CHURCH, Ch. J., EARL and ANDREWS, JJ., dissenting), that upon the case made by plaintiff the inference was legitimate that defendant must have known when he purchased the malt, that he could not continue in business and pay for it, and hence was chargeable with an intent not to pay; that to what extent such case was impaired by the averments and explanations of defendant, depended partly upon the force to be given to the facts and the inferences to be drawn therefrom, and the conclusion of the court below, adverse to defendant, was justifiable, and so conclusive here. *Id.*

4. This court will not review a decision denying or vacating an order of arrest where, in any view of the facts, such decision can be upheld. *Liddell v. Paton.* 893

— *What sufficient evidence of fraud on part of insolvent banker to authorize order of.*

*See Anonymous. (Mem.)* 599

### ASSESSMENT AND TAXATION.

1. Under the provisions of the act of 1813, "to reduce several acts relating particularly to the city of

- New York to one act" (§ 88, chap. 86, Revised Laws of 1813), the omission of the city corporation to pay an award for land taken for widening a street, within four months after confirmation of the report of the commissioners of estimate and assessment, does not alone give a right of action for its recovery; there must be, in addition, an application to the city for payment after the expiration of the four months, by the party entitled thereto. *Fisher v. Mayor, etc.* 73
2. The statute of limitations, therefore, does not commence to run against such a cause of action until application is so made. *Id.*
  3. Under said act, until the confirmation of the report of said commissioners, no lien is created by the proceedings upon land assessed. *Id.*
  4. The inability to find an order of confirmation is not conclusive evidence that no such order was made. It is competent to establish it by other proof. *Id.*
  5. It seems, that an entry made by the corporation attorney, in his register, of the making of such order is, after his death, admissible to prove that fact. *Id.*
  6. A copy, however, of an entry made in the register of an attorney, whose death is not proved, is not competent. *Id.*
  7. As to an assessment made under said act, prior to the Code, a presumption of payment, attached after twenty years from the entry of the order of confirmation, which presumption can only be rebutted by proof of actual payment of a portion thereof within twenty years, or by a written acknowledgment of indebtedness or liability; proof that the assessment has not, in fact, been paid does not rebut the statutory presumption. *Id.*
  8. A certificate of the absence of fraud given in pursuance of, and by the commissioners appointed by the "act in relation to certain local improvements in the city of New York" (chap. 580, Laws of 1872), cures any irregularities and defects in the proceedings of the common council in passing the ordinances, and any omission to advertise the same, and validates an assessment for repaving a street in the city of New York, upon property for which an assessment has been paid for paving, where the work was done after the passage of said act and prior to the passage of the amendatory act of 1874 (chap. 313, Laws of 1874). *In re Peugnet.* 441
  9. The provision of section 7 of said act of 1872, exempting from the effects of such certificate assessments for repaving, only saved the right to have an assessment vacated, for any irregularity or omission to advertise, to persons assessed for a repaving already completed at the time of the passage of the act, or then being done; the amendment of this section by the act of 1874 extending the benefits of this saving clause to those assessed "for work thereafter made, done or performed" took effect only from the time of its incorporation into the original section, and had no retroactive effect. *Id.*
  10. An ordinance authorizing the repaving of a street was passed April 29, 1871, an assessment for the work was confirmed January 30, 1874, before the passage of said amendatory act. In a petition presented on application to vacate the assessment it did not affirmatively appear, nor was there any thing shown from which it could be reasonably inferred, that the work was in progress on May 7, 1872, the date of the passage of the original act; the requisite certificate was given by the commissioners. *Held*, that an order vacating the assessment was error. *Id.*
  11. As to whether the exception in said section was not confined to cases where the contracts had not been passed upon by the commis-

- sloners and declared free of fraud,  
*quare.* *Id.*
12. Under the provisions of the act  
of 1866 (chap. 761, Laws of 1866),  
"authorizing the taxation of  
the stockholders of banks," etc.,  
the actual, and not the par, value  
of the shares of the capital stock  
of national banks is the basis of  
assessment and taxation. *People*  
*ex rel. v. Com's Taxes, etc.* 516
13. It is the duty of assessors to as-  
certain the actual value of the  
shares held by stockholders, and,  
after deducting their proportion of  
the value of the real estate owned  
by the bank, the balance is the pro-  
per sum to be assessed. *Id.*
14. The act of 1865 (chap. 97, Laws  
of 1865), authorizing State banks  
to become national banks, did not  
give to a bank, availing itself of the  
privilege, a contract that its shares  
should not be assessed for more  
than their par value. *Id.*
15. Said act, so far as it provides for  
the taxation of national banks,  
having been declared unconstitu-  
tional and void by the United  
States courts (*Van Allen v. The*  
*Assessors*, 3 Wall., 573; *People v.*  
*Comrs.*, 4 id., 244), if a contract  
was intended, the intent failed,  
and could not affect future legisla-  
tion. *Id.*
16. The fact that State banks can  
divide up their surplus, while na-  
tional banks are required to keep  
on hand a portion of theirs, does  
not make the mode of assessment  
and taxation prescribed by the act  
of 1865 unjustly to discriminate  
against the latter. *Id.*
17. The legislature, therefore, by  
the enactment of said provision  
of the act of 1866, did not inter-  
fere with any of the constitutional  
rights of a bank which, under the  
provisions of said act of 1865, was  
converted from a State into a na-  
tional bank. *Id.*
18. The legislature has power to au-  
thorize the lands of the State to be  
assessed for local improvements.  
*Hassan v. City of Rochester.* 528
19. The provision of the Revised  
Statutes (1 R. S., 387, § 1) exempt-  
ing from taxation lands belonging  
to the State, relates to general,  
county and State taxes; it has no  
reference to assessments for im-  
provements made under special  
laws and of a local character. *Id.*
20. The provision of the charter of  
the city of Rochester, of 1861  
(chap 143, Laws of 1861), provid-  
ing that property which is exempt-  
ed from taxation by the general  
laws of the State may be assessed  
and taxed for local improvements,  
includes lands of the State, and  
removed, as far as such lands situ-  
ate in said city are concerned, any  
exemption then existing by statute  
or otherwise. *Id.*
21. Under the provisions of said  
charter the common council of the  
city, by ordinance, ordered one tier  
of lots on each side of Oak street,  
within certain limits, to be assessed  
for a local improvement. The  
assessors omitted certain lots be-  
longing to the State within the  
prescribed limits, and imposed the  
whole assessment upon the owners  
of other lots. In an action by said  
owners to restrain the collection of  
the assessment, *held*, that the as-  
sessment was illegal and void, and  
the action was maintainable; that  
the assessors in failing to comply  
with the ordinance and with the  
requirements of the statute, did  
not act judicially; and that their  
decision could be reviewed collat-  
erally. *Id.*
22. In the absence of proof it will  
not be assumed in such case  
that plaintiffs' taxes will only be  
increased to an amount so trifling  
that the court will not interfere;  
the presumption is the other way.  
*Id.*
23. Plaintiffs were not bound to  
offer to pay their proportion of the  
assessment. *Id.*
24. Nor was it necessary to prove on  
the trial that the property omitted  
was benefited by the improvement.  
The common council, in passing  
the ordinance prescribing the ter-  
ritory to be assessed, adjudged that

all parts thereof were benefited, and bound the assessors to assume that the lands omitted derived some benefit; and on that assumption it should have been assessed.

*Id.*

25. A confirmation of the assessment by the common council, after notice, did not preclude plaintiffs from the equitable relief sought. The provisions of the charter relating to the confirmation of assessments (§§ 197-199) vests no authority in the common council to confirm an assessment made in violation of an ordinance.

*Id.*

26. The petitioner filed his petition under chapter 338, Laws of 1858, asking to vacate an assessment for a local improvement in the city of New York. The prayer of the petition was granted by the Special Term, but the order thereon was subsequently vacated by a Special Term order, which was affirmed by the General Term. No order was made, however, denying the prayer of the petition. *Held*, that the General Term order was not appealable under subdivision 3 of section 11 of the Code, as it was not a final order; that the result of the order was to leave the petition undisposed of and ready to be brought again to a hearing. *In re Moore.*

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—Article 3, section 17, of State Constitution, prohibiting the making of an existing law applicable to or a part of an act, except by inserting it in the act, does not prohibit the legislature from directing that an assessment for a public work directed to be paid by tax shall be made and the tax collected in the manner provided by law.

*See People ex rel. Comrs. v. Banks.*

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#### ASSIGNMENT.

1. An assignee of a mortgage takes it subject to the equities attending its execution; he stands in the place of the mortgagee and can only enforce it in case it could be enforced by the latter if he had not assigned it. *Crane v. Turner.*

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2. P. and wife executed a mortgage upon premises of which the former had possession under a contract of sale, which mortgage was duly recorded. P. thereafter received a deed, which was recorded; the mortgage was assigned to plaintiff's testator. P. subsequently sold and conveyed the premises, receiving from the grantee a mortgage for a part of the purchase-money, which was duly recorded; the grantee had notice of the prior mortgage. P. assigned his mortgage to defendant T., assuring him that the mortgage was the first lien. T. searched the records back to the deed to P. In an action to foreclose the first mortgage, T. claimed that his mortgage was entitled to priority. *Held*, untenable; that as P. would be estopped from claiming a priority if he had retained the mortgage, his assignee had no superior right and was also estopped; and that the fact that the records showed a perfect chain of title sustaining T.'s mortgage gave it no precedence. *Id.*

3. The only effect of recording an assignment of a mortgage is to protect the assignee against a subsequent sale by the mortgagee of the same mortgage. *Id.*

#### ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Under the act of 1874 (chap. 600, Laws of 1874) in relation to assignments for the benefit of creditors, an omission to make and deliver verified schedules does not invalidate the assignment. *Produce Bk. v. Morton.* 199
2. This action was brought upon a promissory note made by C. and indorsed for his accommodation by defendant's testator. The firm in which C. was a partner made an assignment for the benefit of creditors to plaintiff, giving preferences, defendant's testator being one of the preferred creditors. Defendant claimed that plaintiff had collected, as assignee, sufficient to pay the preferred debts. This claim was disputed and there had been no settlement of plain-

tiff's accounts, as assignee. *Held*, that defendant could not, in this action, compel an application by plaintiff of the funds in his hands, as assignee, toward the payment of the note; that the amount in his hands applicable for that purpose could only be determined by an accounting, and the assignee was entitled to have his entire account settled in one accounting, which should protect him against all the parties who could claim under the assignment; he could not be compelled to account separately to each creditor. *Bailey v. Bergen.* 346

"Where different actions have been brought by creditors, in behalf of themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to make an order to compel all the creditors to come in and prove their claims in the suit first brought, or wherein interlocutory judgment is first obtained, and to stay all proceedings in the other actions. *Travis v. Myers.* 542

4. The terms of the order are within the discretion of the court, and cannot be reviewed here. *Id.*

#### ATTORNEY AND CLIENT.

1. Under the provisions of the act of 1871 (chap. 486, Laws of 1871) in relation to the qualifications of persons applying to be admitted to practice as attorneys, etc., it is for the General Term to satisfy itself of and to approve the applicant "for his good character and learning." The exercise of this discretionary power by the General Term cannot, ordinarily, be reviewed or interfered with by this court. *In re Beggs.* 120

2. *It seems* that if the General Term should deny, in a particular case, that it had the legal power to admit, though satisfied that the applicant was possessed of the requisite qualifications, this court might review the order so far as to discover whether the power ex-

isted; so, also, if a clear case of abuse of discretion appeared this court might correct. *Id.*

3. An appeal from an order refusing to approve of the good character of an applicant, and denying his admission on that ground, cannot be sustained where the case furnished does not present all the facts before the General Term and upon which it acted. *Id.*

4. Certain judgment creditors of the owner of the equity of redemption were not made parties originally to an action for foreclosure. After entry of judgment, upon written consent of the attorneys for said creditors, it was ordered that all the papers and proceedings be amended, *nunc pro tunc*, by adding their names, and that they be bound by the proceedings. *Held*, that it was incumbent upon plaintiff to establish unequivocally, the authority of the attorneys to enter into the stipulation; that without such authority the judgment creditors were not bound; and, in the absence of proof thereof, a purchaser on sale under the judgment could not be compelled to take the title. *Lyon v. Lyon.* 250

5. Where process for the commencement of an action in a State court against a foreign insurance corporation, doing business in the State, has been served upon it in the manner prescribed by the insurance laws of the State, and the attorney who appears for it in the State court, at the time of entering an appearance, files a petition and moves for a removal of the cause, the defendant is bound by the acts of the attorney, and the petition and filing are its acts. *Shaft v. Phoenix Ins. Co.* 544

#### ATTORNEY-GENERAL.

1. Under the provisions of the Code (§ 432) authorizing actions in the nature of a *quo warranto* to try the title to office, no positive duty is imposed upon the attorney-general to bring an action upon request of a party claiming office from which

he is expelled, but it is a matter within his discretion, and the courts cannot sit in judgment upon his exercise thereof or coerce his action. *People ex rel. v. Fairchild*. 384

2. Accordingly, *held*, that a *mandamus* would not lie at the instance of a claimant to an office to compel the attorney-general to commence such an action. *Id.*

3. No superior right to compel action on the part of the attorney-general is given by the fact that the incumbent of the office holds under a law attempting to abrogate the form of government of a municipal corporation and to create a new one, which law is claimed by the contestant to be unconstitutional. The attorney-general cannot be compelled to bring an action to settle that question. *Id.*

#### BANKS AND BANKING.

1. In an action by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the custom and common understanding of banks and merchants the words "certified" at the time of the certification, when used in the certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, is inadmissible. *Security Bk. v. Nat. Bk. Republic*. 458

2. The plaintiff in such an action is not estopped from alleging the forgery by the fact that its teller at the time the check was presented for certification upon doubts being expressed in regard to it by the person presenting it, stated that it was right in every particular. It is no part of a teller's duty to give an assurance as to the genuineness of a check, except in respect to the signature of the drawer; and beyond that the bank is not bound by his representations. *Id.*

3. Under the provisions of the act of 1866 (chap. 761, Laws of 1866), "authorizing the taxation of the stockholders of banks," etc., the actual, and not the par, value of the shares of the capital stock of national banks is the basis of assessment and taxation. *People ex rel. v. Comrs. Taxes, etc.* 516

4. It is the duty of assessors to ascertain the actual value of the shares held by a stockholder, and, after deducting their proportion of the value of the real estate owned by the bank, the balance is the proper sum to be assessed. *Id.*

5. The act of 1875 (chap. 97, Laws of 1865), authorizing State banks to become national banks, did not give to a bank availing itself of the privilege a contract that its shares should not be assessed for more than their par value. *Id.*

6. Said act, so far as it provides for the taxation of national banks, having been declared unconstitutional and void by the United States courts (*Van Allen v. The Assessors*, 3 Wall., 573; *People v. Comrs.*, 4 id., 244), if a contract was intended, the intent failed, and could not affect future legislation. *Id.*

7. The fact that State banks can divide up their surplus, while national banks are required to keep on hand a portion of theirs, does not make the mode of assessment and taxation prescribed by the act of 1865 unjustly to discriminate against the latter. *Id.*

8. The legislature, therefore, by the enactment of said provision of the act of 1866, did not interfere with any of the constitutional rights of a bank which, under the provisions of said act of 1865, was converted from a State into a national bank. *Id.*

9. In the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause wide-spread disaster, a more rigid responsibility for good faith and honest

dealing will be enforced than in the case of merchants and other traders. *Anonymous.* 598.

10. A banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, i. e., to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business.

*Id.*

## BEQUESTS.

*See* WILLS.

## BILLS, NOTES, CHECKS.

1. This action was brought upon a promissory note made by C. and indorsed for his accommodation by defendant's testator. The firm in which C. was a partner made an assignment for the benefit of creditors to plaintiff, giving preferences, defendant's testator being one of the preferred creditors. Defendant claimed that plaintiff had collected, as assignee, sufficient to pay the preferred debts. This claim was disputed and there had been no settlement of plaintiff's accounts, as assignee. *Held*, that defendant could not, in this action, compel an application by plaintiff of the funds in his hands, as assignee, toward the payment of the note; that the amount in his hands applicable for that purpose could only be determined by an accounting, and the assignee was entitled to have his entire account settled in one accounting, which should protect him against all the parties who could claim under the assignment; he could not be compelled to account separately to each creditor. *Basley v. Bergen.*

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2. In an action by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the custom

and common understanding of banks and merchants the words "certified" at the time of the certification, when used in the certification of checks, is construed to impart an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, is inadmissible. *Security Bk. v. Nat. Bk. of Republic.* 459

3. The plaintiff in such an action is not estopped from alleging the forgery by the fact that its teller, at the time the check was presented for certification, upon doubts being expressed in regard to it by the person presenting it, stated that it was right in every particular. It is no part of a teller's duty to give an assurance as to the genuineness of a check, except in respect to the signature of the drawer; and beyond that the bank is not bound by his representations.

*Id.*

## BILL OF PEACE.

— *When action to restrain prosecution to recover statutory penalty cannot be sustained as.*

*See* Wallack v. Society, etc. 23

## BOARD OF SUPERVISORS.

*See* SUPERVISORS.

## BONA-FIDE PURCHASER.

One to whom a bond and mortgage, given to secure the price of property upon a fraudulent sale, is assigned without any pecuniary consideration being paid but simply as a gift, does not occupy the position of a bona-fide purchaser, so that the contract cannot be rescinded as to him. *Baker v. Lever.* 304

— *When mortgage is taken in good faith, has preference over prior judgment, upon the docket of which has been indorsed "secured on appeal."*

*See* U. D. S. Inst. v. Duryea. 84



## BOND.

1. Defendant executed a bond, "to be binding for one year only from date," conditioned that G. would pay within five days after maturity any paper discounted by plaintiff for him. In an action upon the bond, *held* (CHURCH, Ch. J., dissenting), that the limitation as to time related to the time when paper was discounted, not when it matured; and that under it defendant was liable for paper discounted within the year, but not maturing until after its expiration. *Davis v. Copeland.* 127

2. F., defendant's intestate, executed to P., plaintiff's testator, his bond, conditioned to pay \$8,763, in installments, with annual interest, at six per cent. F. was the agent of P., and had in his hands this bond, with the other securities of his principal. F. annually computed the amount due upon the bond, compounding the interest, attaching each yearly computation to the bond, and entering it in a bond book kept by him as such agent. At the termination of F.'s agency, an account was stated between him and his principal, one item of which was the amount found due upon the bond, with interest so compounded; reckoning simple interest only, the payments made by F. upon the bonds were more than sufficient to pay it in full. In an action upon the account stated, *held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that there was no promise or agreement to pay compound interest, as the statement of the account was but an admission of the correctness of the balance with interest compounded; that if one could be construed or implied from the account stated, there was no consideration to support the same; and that the claim could not be brought within the principle upon which compound interest is allowed upon the periodical statement of accounts between merchants. *Young v. Hill.* 162

3. Also, *held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting),

that the amount due upon the bond could not be recovered in an action as upon an account stated; that the action should have been brought upon the bond itself. *Id.*

*See* RECOGNIZANCE.

TOWN BONDING.

## BROKER.

—Action for commissions agreed to be paid by president of corporation for sale of its bonds.

*See* Seligman v S. and N. Ala. R. Co. (Mem.) 584

## BUILDING CONTRACT.

1. One C. contracted to erect a building on defendant's premises, eighty per cent of the contract-price to be paid during the progress of the work, the residue when it was completed. After the eighty per cent was paid, a mechanic's lien was filed for materials furnished to C. In an action to foreclose the same, defendant offered to prove that the contractor became unable to complete the building, and, after the filing of the lien, defendant, in order to complete it, was forced to, and did, purchase materials and pay for labor to an amount exceeding the residue unpaid. The evidence was excluded. *Held*, error; that expenditures made under such circumstances could not be treated as payments to the contractor upon his contract, which would, under the mechanic's lien law of 1854 (chap. 412, Laws of 1854, as amended by chapter 558 of Laws of 1869) render the owner liable to a material-man, even although there was no formal abandonment of the contract. *Rodbourn v. S. L. G. and W. Co.* 215
2. By the terms of a building contract, the work was to be completed by December first; it was not so completed. The contractors were called upon to do extra work, and, with the consent of the owner, continued work until January eighth thereafter, when they failed and discontinued work.

The owner did not declare the contract forfeited, but obtained the contractor's consent to go on and finish it. The cost of completing the work was less than the amount unpaid upon the contract, adding thereto the value of the extra work. In an action by a materialman to foreclose a mechanic's lien, *held*, that the owner could not claim the contract forfeited; but the inference was that he undertook to complete the building at the contractor's expense, and that the lienors were entitled to the residue. *Wheeler v. Schofield*. 311

3. Plaintiffs contracted to put an attic story and mansard roof on the house of defendant, the final payment to be made when the work was "done and completely accepted." The contract specified that the sides of the attic story were to be covered with plank, the frame "to be sheathed with pine boards, sheathing to be covered with felt." In an action upon the contract to recover the final payment, defendant's evidence tended to show that a strip two or three feet wide, extending across the house on one side in the new attic story, was left by plaintiffs without any felt, covering the sheathing. *Held*, that the contract required plaintiffs to cover the entire sheathing with felt; that this was a question of law for the court, and a submission thereof to the jury was error. *Glacius v. Black*. 563

— Contract to build school-house construed.

*See Cook v. Allen*. (Mem.) 578

**CASES REVERSED, DISTINGUISHED, LIMITED, OVERRULED AND DISAPPROVED.**

*Fairfax v. N. Y. O. and H. R. R. Co.* (5 J. & S., 516) reversed.  
*Fairfax v. N. Y. O. and H. R. R. Co.* 11

*Levy v. Brush* (45 N. Y., 589) distinguished. *Traphagen v. Burt*. 35

*Austin v. Rawson* (44 N. Y., 68) distinguished. *Smith v. Hall*. 51

*Clark v. Comrs., etc.* (1 T. & C., 193), distinguished. *People ex rel. Miller v. Griswold*. 62

*Ackerman v. Hoyt* (6 Hun, 801) reversed. *Ackerman v. Gorton*. 63

*Weaver v. Barden* (49 N. Y., 286) distinguished. *U. D. Sogs. Inst. v. Duryea*. 87

*Cary v. White* (52 N. Y., 138) distinguished. *U. D. Sogs. Inst. v. Duryea*. 87

*Suprs. v. Briggs* (2 Den., 26) distinguished. *People v. Suprs. Mont. Co.* 114

*People v. Suprs. Liv. Co.* (26 Barb., 118) distinguished. *People v. Suprs. Mont. Co.* 114

*Suprs. v. Birdsall* (4 Wend., 453) distinguished. *People v. Suprs. Mont. Co.* 114

*People v. Stocking* (50 Barb., 578) distinguished. *People v. Suprs. Mont. Co.* 114

*People v. Stout* (23 Barb., 349) distinguished. *People v. Suprs. Mont. Co.* 114

*In re Graduates, etc.* (11 Abb. Pr., 801), distinguished. *In re Beggs*. 121

*Fowler v. Gold Exchange Bk.* (6 Hun, 186) reversed. *Fowler v. N. Y. Gold Exchange Bk.* 138

*Young v. Hill* (6 Hun, 613) reversed. *Young v. Hill*. 162

*Mowry v. Bishop* (5 Paige, 98) limited. *Young v. Hill*. 169

*Stewart v. Petrie* (55 N. Y., 621) distinguished. *Young v. Hill*. 170

*Edington v. Mut. L. Ins. Co.* (5 Hun, 1) reversed on last point stated. *Edington v. Mut. L. Ins. Co.* 185

*Swift v. Mass. Mut. L. Ins. Co.* (68 N. Y., 186) distinguished. *Edington v. Mut. L. Ins. Co.* 193

- Hewitt v. Prince* 21 W. & L., 79, distinguished. *Edington v. Mut. L. Ins. Co.* 195
- Produce Bk v. Morton* (9 J. & S., 323) disapproved. *Produce Bk v. Morton.* 199
- Sloan v. G. W. R. Co.* (6 Hun, 546, reversed. *Sloan v. G. W. R. Co.* 203
- McMillan v. Seneca Lake G. and W. Co.* (5 Hun, 12) reversed. *Robbourn v. Seneca Lake G. and W. Co.* 215
- Cummins v. Ag. Ins. Co.* (5 Hun, 554) reversed. *Cummins v. Ag. Ins. Co.* 260
- Paine v. Ag. Ins. Co.* (5 T. & C., 619) distinguished. *Cummins v. Ag. Ins. Co.* 262
- Weston v. City Ins. Co.* (15 Wis., 138) distinguished. *Cummins v. Ag. Ins. Co.* 263
- Harrison v. City Ins. Co.* (9 Al., 231) distinguished. *Cummins v. Ag. Ins. Co.* 263
- Kelch v. Quincy Ins. Co.* (10 Al., 228) distinguished. *Cummins v. Ag. Ins. Co.* 263
- Jutte v. Hughes* (8 J. & S., 126) reversed. *Jutte v. Hughes.* 267
- People ex rel. v. Supra. Col. Co.* (8 Hun, 275) reversed. *People ex rel. v. Supra. Col. Co.* 330
- Faure v. Martin* (7 N. Y., 210) questioned. *Wilson v. Randall.* 341
- Everitt v. Everitt* (29 N. Y., 40) distinguished. *Colton v. Fox.* 352
- Murdock v. Ward* (8 Hun, 9) reversed. *Murdock v. Ward.* 387
- Mor. Ins. Co. v. Hinman* (15 How. Pr., 182) distinguished. *Murdock v. Ward.* 390
- Knickerbocker v. Seymour* (46 Barb., 198) distinguished. *Murdock v. Ward.* 390
- Dewey v. Goodenough* 36 Barb., 34 distinguished. *Murdock v. Ward.* 397
- Kyle v. Kyle* 3 Hun, 438 modified. *Kyle v. Kyle.* 439
- Sisters of Charity v. Kelly* 7 Hun, 290; reversed. *Sisters of Charity v. Kelly.* 439
- Beckin v. Beckin* (36 N. Y., 416) distinguished. *Sisters of Charity v. Kelly.* 442
- Willis v. Mott* (36 N. Y., 436) distinguished. *Sisters of Charity v. Kelly.* 444
- In re Woodley* (3 S. & T., 429) distinguished. *Sisters of Charity v. Kelly.* 446
- In re Cassmore* (L. R., P. & D., 1) distinguished. *Sisters of Charity v. Kelly.* 446
- Ditchett v. S. D. and P. M. R. R. Co.* (5 Hun, 165) reversed. *Ditchett v. S. D. and P. M. R. R. Co.* 425
- Hauck v. Craighead* (8 Hun, 237) reversed. *Hauck v. Craighead.* 432
- In re Astor* (53 N. Y., 617) distinguished. *In re Peugnet.* 443
- People ex rel. Miller v. Bd. Police Comrs.* (6 Hun, 229) reversed. *People ex rel. Miller v. Bd. Police Comrs.* 475
- Flynn v. Eq. L. As. Soc. of U. S.* (7 Hun, 387) reversed. *Flynn v. Eq. L. As. Soc. of U. S.* 500
- Shaft v. Phoenix Mut. L. Ins. Co.* (3 Hun, 632) reversed. *Shaft v. Phoenix Mut. L. Ins. Co.* 544
- Kirkpatrick v. Hopkins* (3 Miles, 377) distinguished. *Shaft v. Phoenix Mut. L. Ins. Co.* 550
- Glacius v. Black* (4 Hun, 91) reversed. *Glacius v. Black.* 563
- People ex rel. v. Morgan* (55 N. Y., 587) distinguished. *People ex rel. v. Phillips.* 563

*Titus v. Inhabitants of H.* (97 Mass., 268) distinguished. *Macaulley v. Mayor, etc., of N. Y.* 608

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# CAUSE OF ACTION.

1. The court will not sustain an action to restrain a prosecution to recover a penalty imposed by statute, on the ground of the invalidity of the statute, at least until its invalidity has been determined in a previous action. *Wallack v. Society, etc.* 28

2. Nor can an action to restrain such prosecution be sustained as a bill of peace, where the plaintiff brings it in his own behalf, and not also in behalf of others claiming the same right. *Id.*

3. So, also, a court of equity will not issue an injunction restraining defendant from applying to such court for equitable relief in the same matter; especially where such relief is expressly authorized by a statute, the validity of which has not been judicially questioned. *Id.*

4. Accordingly *held*, that even assuming the unconstitutionality of the act of 1872, "regulating places of amusement in the city of New York" (chap. 836, Laws of 1872), plaintiff, a theatrical manager, could not maintain an action to restrain defendant, "The Society for the Reformation of Juvenile Delinquents," etc., from suing for the penalty imposed by said act upon any person exhibiting a dramatic exhibition without a license, or from enjoining such an exhibition. *Id.*

5. Defendant made, in one of its streets upon which was situated a lot belonging to plaintiff, a gutter and curb, which ended opposite plaintiff's lot, and which con-

ducted the water of the ward down that street; the water having no outlet, flowed upon plaintiff's lot, flooding his house, etc. Before this gutter was made there was a natural course which took off the water another way. A drain could have been made to carry it off. In an action to recover the damages, *held*, that the facts established a cause of action. *Byrnes v. City of Cohoes.* 204

6. The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply where the necessity for the drainage is caused by the act of the corporation itself. *Id.*

7. Plaintiff, an expressman, sought passage upon defendant's boat for the purpose, among other things, of taking, while on the boat, orders from the passengers for the delivery of baggage. Defendant had granted the privilege of transacting this business on the boat to another, and as plaintiff continued it after having been directed to desist, and refused to promise to discontinue it, defendant caused him to be ejected from its boat, and refused him passage. In an action to recover damages, *held*, that defendant's action was justifiable, and that it was not liable. *Barney v. O. B. and H. St't Co.* 801

8. Defendant and plaintiffs' testator, W., contracted for the sale, by the former to the latter, of a certain piece of land. The contract, after describing the land by metes and bounds, thus continues: "containing fifty-four fifteen-hundredths acres of land, be the same more or less, for the sum of three hundred and fifty dollars per acre," which W. agreed to pay. When the deed was executed, defendant claimed that the surveyor had made a mistake, that there was in fact fifty-six fifteen one-hundredths acres; the purchase-price for that quantity at the agreed price per acre was inserted as the consideration in the deed, and was paid by W. Following the description in the deed were the words, "containing fifty-six and fifteen one-hundredths acres of land, be the same more or

less." There was, in fact, but forty-eight forty-seven one-hundredths acres in the piece. In an action to recover back the payment in excess of the purchase-price of the actual quantity, *held*, that taking the contract and deed together, it appeared that the sale was by the acre, not by the piece, and that plaintiff was entitled to recover. *Wilson v. Randall.* 338

9. Where one holding securities in pledge for a loan, in pursuance of a sale thereof made by the owner, delivers the same to the purchaser, receives the purchase-price, and after deducting the amount of the loan pays over the residue to the owner, this is not an affirmation by the pledgee of the genuineness of the securities, and, in the absence of fraud, an action cannot be sustained against him by the purchaser to recover back the purchase-price in case the securities prove to be forgeries. *Baker v. Arnot.* 448

—To restrain collection of illegal assessment.

*See Hassan v. City of R.* 528

### CERTIORARI

1. Although there may be no statutory limitation of time for bringing a common-law *certiorari*, the writ and proceedings based upon it have no office to perform when there is no legal right that can be enforced or protected by it. *People ex rel. Gray v. Phillips.* 582.

2. Under the provisions of the act authorizing the bonding of certain towns in aid of the Lake Ontario Shore Railroad (chap. 811, Laws of 1868; amended by chap. 241, Laws of 1869), proceedings for bonding the town of Y. were completed and the requisite papers filed in the office of the county clerk August 25, 1870. The commissioners of the town, acting thereon, subscribed for stock in November, 1871, and in May, 1872, paid for the same by delivering town bonds to the full amount. During that year the board of supervisors of the county made

provision by tax for payment of the interest for the ensuing year, and a semi-annual installment was paid in April, 1873. The relators, tax-payers of said town, in August, 1873, proceeded by a common-law writ of *certiorari*, directed to the county clerk, the commissioners and assessors, to review their proceedings, and the General Term affirmed the proceedings. *Held* (EARL, J., dissenting), that the assessors, whose official action alone it could be at all important to review, were in all matters brought up by the writ *functus officio* when it was issued, and their powers and duties could not be revived, or their action nullified so as to affect the rights or title of holders of the bonds, or the liability of the town thereon by any judgment upon the writ, that the relators had no rights which could be affected by any such judgment; and that the writ should have been quashed; but, as the judgment of affirmance was for all practical purposes a nullity, that an appeal therefrom brought up nothing for review, or upon which a judgment could be given enforceable by execution, and, therefore, that the appeal should be dismissed. *Id.*

3. Also, *held*, that under said statute it was in the application to the county judge for the appointment of commissioners, if anywhere, that it should be made to appear that the town was "situate along the route" of said railroad, the duty of the assessors being limited to the examination of the contents, and determining whether the requisite number of tax-payers had assented to bonding the town; and as said application was not before the court, or the title of the commissioners challenged, the question as to whether there was a defect in showing the location of the town was not presented. *Id.*

### CHALLENGE.

1. The provision of the act of 1873 (chap. 475, Laws of 1872), providing that a present opinion or impression in reference to the gulf

or innocence of a prisoner, or the expression of such an opinion, shall not, in the cases specified, be a sufficient ground of challenge for principal cause, does not interfere with or affect the challenge for favor. *Thomas v. People*. 218

2. Under the provisions of the act of 1873 (chap. 427, Laws of 1873), providing that either party may except to the determination of the court upon a challenge for favor, and that the court may review such decision upon writs of error or *certiorari*, this court, upon writ of error, has the same power to pass upon the question involved in the challenge which the trial court had. *Id.*

#### CLERK (EIGHTH DISTRICT COURT N. Y. CITY).

1. Both by the special statute (chap. 217, Laws of 1866) and the general statutes (chap. 514, Laws of 1851; chap. 344, Laws of 1857) relating to the term of office of the clerk of the Eighth District Court of the city of New York, such term is for a period of six years, and is not dependent upon the expiration of the term of office of the justice of said court. *People ex rel. v. Leask*. 521
2. The act of 1872 (§ 1, chap. 438, Laws of 1872) changed the provisions of the act of 1866 by providing another appointing power and by fixing the time of appointment and the commencement of the new term (*i. e.*, immediately after the passage of the act), but it left untouched the duration of the term. *Id.*
3. Accordingly, *held*, that the relator, who was appointed clerk of said court by the then justice thereof in May, 1872 (after the passage and in pursuance of said act of 1872), was entitled to a term of six years, and could not be removed before the expiration thereof by the justice succeeding the one who made the appointment. *Id.*

#### CODE OF PROCEDURE.

- § 11. *See Pennie v. C. Life Ins. Co.*, 278.
- § 11. *See Wheeler v. Scofield*, 811.
- § 11. *See Roosevelt v. Linkert*, 447.
- § 11. *See Patten v. N. Y. E. R. Co.*, 484.
- § 150. *See Bruce v. Burr*, 237.
- § 268. *See Produce Bk. v. Morton*, 199.
- § 282. *See U. D. S. Inst. v. Duryea*, 84.
- § 294. *See Produce Bk. v. Morton*, 199.
- § 390. *See Edington v. Mut. L. Ins. Co.*, 185.
- § 401. *See Phillips v. Wheeler*, 104.
- § 463. *See People ex rel. Demarest v. Fairchild*, 834.

#### COMMISSIONER OF JURORS OF NEW YORK.

1. The provision of the act of 1869 providing for the government of the county of New York (§ 7, chap. 875, Laws of 1869) which prohibits the board of supervisors of said county from increasing salaries, "except as provided by acts of the legislature," does not apply where the legislature has expressly authorized said board to increase the salary. *Taylor v. Mayor, etc.* 87
2. Accordingly, *held*, that a resolution of said board passed December 28, 1869, under the authority of the act of 1855, in relation to the salaries of certain judicial officers (§ 1, chap. 575, Laws of 1855), authorizing it to increase the salaries of the city judge and other officers, which resolution increased the salary of the city judge to \$15,000 a year, to take effect January 1, 1870, was valid; and that under the provision of the act of 1870 relating to jurors for the city and county of New York (§ 17, chap. 539, Laws of 1870), providing that the salary of the commissioner of jurors "shall be at the same rate as the salary paid to the city judge," the said commissioner was entitled to a salary of \$15,000 per annum. *Id.*
3. Also, *held*, that the act of 1872 (chap. 367, Laws of 1872) confirm-

ing said resolution was not controlling to show that the resolution was invalid prior thereto, but was in the nature of a declaratory act.

*Id.*

4. Also, *held*, that the fact that the city judge, either by accident or design, was not actually paid at the rate of \$15,000 after January, 1870, did not affect the rights of said commissioner of jurors; the intent was to give him the salary the city judge was entitled to, and whether the latter officer received it or not was immaterial. *Id.*

5. Prior to the passage of the city charter of 1873 (chap. 835, Laws of 1873) the office of commissioner of jurors was not a city office, and the provision of said act (§ 97) authorizing the board of apportionment to reduce the salary of all officers paid from the city treasury, "whose offices now exist," did not apply to such office, as it only included city offices then existing, not those made city offices by the act itself. *Id.*

6. Accordingly, *held*, that a resolution of the board of apportionment fixing the salary of said commissioner at \$5,000 on July 1, 1873, was invalid. *Id.*

7. *It seems*, that a resolution of the board of apportionment that the salary of a city officer "be fixed" at a less sum than that theretofore paid has the effect to reduce the salary, the same as if the word "reduce" had been used in the resolution. *Id.*

8. Plaintiff, who at the time of the passage of said charter of 1873 was commissioner of jurors, continued to discharge the duties of the office after April 1, 1873, the time when, by the provisions of said charter (§ 117), his term of office expired, and up to April 1, 1874, no successor having been appointed, *held*, that this was to be regarded as a holding over under the provisions of the Revised Statutes (1 R. S., 117, § 9); and that plaintiff was entitled to his salary up to the time he ceased to act. *Id.*

## COMMON CARRIERS.

1. A common carrier of passengers may establish on his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders from passengers in competition with such agency. *Barney v. O. B. and H. St. Co.* 381
2. Plaintiff, an expressman, sought passage upon defendant's boat for the purpose, among other things, of taking, while on the boat, orders from the passengers for the delivery of baggage. Defendant had granted the privilege of transacting this business on the boat to another, and as plaintiff continued it after having been directed to desist, and refused to promise to discontinue it, defendant caused him to be ejected from its boat, and refused him passage. In an action to recover damages, *held*, that defendant's action was justifiable; and that it was not liable. *Id.*

## COMMON SCHOOLS.

The power given to school district trustees to contract with and employ teachers (chap. 555, Laws of 1864) is not limited to an employment during the trustees' term of office; but a contract with a teacher for a period extending beyond their term, if made in good faith, without fraud or collusion, and for a reasonable period, is valid and binding upon their successors. *Wait v. Hay.* 36

## CONDITIONS.

— *When forfeiture by breach of waived.*

*See Cook v. Wardens, etc. (Mem.)* 594

## CONSTITUTIONAL LAW.

1. The act of 1873 (chap. 531, Laws of 1873) is not amenable to the constitutional objection (Const., art. 2,

§ 16) that it embraces more than one subject. The title to the act is expressive of the subject, which is to open certain lands for public use, and the different provisions are but the details of that subject. *In re P. P. and C. I. R. R. Co.* 372

2. So, also, the act of 1874 (chap. 448, Laws of 1874) entitled "An act for the relief of Park Avenue Railroad Company, in the city of Brooklyn, and to authorize the extension of its tracks through certain streets and avenues in said city," expresses the subject sufficiently for the purposes of said constitutional provision. The subject, *i. e.*, the relief of the company, necessarily includes provisions removing restrictions upon its powers, and giving it greater powers. *Id.*

3. The constitutional provision (art. 8, § 1) in reference to the formation of corporations does not render a special charter, or a special addition to a charter taken under a general law, unconstitutional. *Id.*

4. The subdivision 4, added to section 11 of the Code in 1865, allowing an appeal from a decision of a motion which involved the constitutionality of a State law, was repealed by the amendment of said section in 1867, which added as subdivision 4 a new and different provision; the subdivision, as thus enacted, took the place of the same subdivision as it had previously existed. *Putten v. N. Y. El. R. R. Co.* 484

5. *It seems* that the subdivision so repealed did not apply to a decision of the New York Common Pleas. *Id.*

6. There is no constitutional objection to the creation by the legislature of statutory liens in favor of mechanics and others, for the purposes, and under the circumstances and limitations specified in the statutes known as mechanics' lien laws. *Glacius v. Black.* 563

7. The act entitled "An act in relation to that portion of the Great

Western Turnpike road, commonly known as Western avenue," etc. (chap. 445, Laws of 1876), is not obnoxious to the constitutional provision (State Const., art. 8, § 16) requiring that local and private bills shall embrace but one subject which shall be expressed in the title. The act simply authorizes a conveyance by the turnpike company, and an acceptance by the commissioners of Washington park, of a portion of the turnpike road, and empowers the latter to improve the same as an approach to the park, and makes provision for such improvement. The whole relates solely to that portion of the road specified in the title, and the purpose of the act is confined to the one subject, which is sufficiently expressed in the title. *People ex rel. Com'rs v. Banks.* 568

8. The legislature is not subject to judicial control in respect to the form or mode in which the "subject" of a bill shall be "expressed" in its title; if expressed, the Constitution is satisfied, although the title may have been more explicit. *Id.*

9. The authorities upon the question of the sufficiency of the titles to bills, under the said constitutional provision, collated. *Id.*

10. The said statute is not in conflict with the constitutional provision forbidding the passage of a private or local bill "laying out, opening, altering, working or discontinuing roads, highways or alleys." (Art. 3, § 17.) This provision was intended to prevent any interference with the general highway system of the State. The portion of the road effected by the act while a public highway, was the property of a private corporation, and the act provides for that which is not ordinarily done under the general highway laws, and for which no general provision is made; and it is within the legislative power to confide it to the commissioners. *Id.*

11. Said statute is not violative of the constitutional provision declaring that no act shall be passed



making an existing law applicable to, or a part thereof, except by inserting it in the act. (Art. 3, § 17.) This provision does not require the re-enactment of general laws whenever it is necessary to resort to them to carry into effect a special statute. *Id.*

12. The legislature may direct that an assessment for the costs and expenses of a work, specially provided for and directed to be paid by tax, shall be made and collected in the manner provided by general laws. *Id.*

13. Said statute is not in conflict with the constitutional provision prohibiting cities from loaning their money or credit to, or in aid of, any individual, association or corporation. (Art. 8, § 11.) The fact that the city of Albany is in the first instance made to pay the cost of a public burden, to be reimbursed thereafter by tax upon the property benefited, does not constitute the payment a loan to the property owners. *Id.*

— *Act of 1866 (chap. 761), authorizing taxation of stockholders of banks, not unconstitutional.*

*See People v. Comrs.*

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### CONTRACT.

1. The power given to school district trustees to contract with and employ teachers (chap. 535, Laws of 1864) is not limited to an employment during the trustees' term of office; but a contract with a teacher for a period extending beyond their term, if made in good faith, without fraud or collusion, and for a reasonable period, is valid and binding upon their successors. *Wait v. Ray.* 36

2. Plaintiff purchased of defendant certain railroad bonds, with the option of returning if he became sick of them, in which case defendant agreed to repay the purchase-money. Plaintiff sold the bonds to others, for whom, as the evidence tended to show, he made the investment, giving them the same option; this they exercised,

and plaintiff received back the bonds, tendered them back to defendant and demanded the purchase-money, which defendant refused to repay. In an action to recover the same, *held*, that the transfer by plaintiff did not impair his right to return the bonds. *Wooster v. Sage.* 6

3. Plaintiff did not offer to return the bonds until about three years after his purchase. Plaintiff gave some evidence tending to show that the delay was at the request of defendant; the latter, at the close of plaintiff's evidence, moved for a nonsuit on the ground, among other things, that the agreement was within the statute of frauds, which was denied. The question of time was not afterwards presented, nor was there any request to present it to the jury. *Held*, that the nonsuit was properly denied; that under all the circumstances, as developed, the case did not show conclusively, as matter of law, that the delay was unreasonable; and if it did the point was not available, as there was no exception presenting it. *Id.*

4. Also *held*, that the receipt by defendant of the amount of two coupons upon the bonds did not affect his right of recovery, he accounting for the amount received. *Id.*

5. Evidence as to the amount of damages is not necessary in such an action. *Id.*

6. In an action to recover damages for an alleged breach by defendant of a contract to deliver plaster stone, plaintiff's evidence tended to show that defendant contracted to ship from N. S. and to deliver to plaintiff, at N. Y. or W., 3,000 tons of said stone during the season, the same to be delivered as fast as vessels could be obtained in N. S. to carry them, to be paid for on delivery. Defendant, during the season, shipped two cargoes of the stone to N. Y., delivery of which defendant, upon arrival, demanded and was ready to receive and pay for, but defend-

*plaintiff*

ant refused to deliver. The court nonsuited plaintiff. *Held*, error; that the right to take the whole season for delivery was limited by the provision to ship as fast as vessels could be obtained; that the proof that defendant had shipped cargoes, which arrived, was evidence that it could have obtained vessels before the close of the season; also, that as plaintiff was ready to receive and pay for the cargoes which did arrive, it was no defence to the action that he was not ready to receive and pay for the balance at the end of the season. *Isaacs v. N. Y. Plaster Works*. 124

7. Where interest has already accrued, the parties may lawfully agree to turn such interest into principal so as to carry interest *in futuro*, and the forbearance will constitute a consideration; but a promise to pay interest upon interest, which is to operate retrospectively, and is supported by no consideration save a moral one resulting from the fact that the interest is in arrear and unpaid, is not valid (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting). *Young v. Hill*. 162

8. *It seems* that it is not necessary to the validity of a promise to pay compound interest that it be in writing. *Id.*

9. Defendant contracted to do the work and furnish materials in constructing tracks for the N. Y. C. and H. R. R. Co. The contract provided "that all stone taken from excavations which may, in the opinion of the engineer be suitable for masonry shall be deposited in some convenient place \* \* \* to be designated by him, and shall be the property of the company." Plaintiff entered into a sub-contract with defendant for a portion of the work. In an action to recover a balance alleged to be due thereon, defendant offered to prove that plaintiff took from excavations and used 1,149 yards of stone, and that in defendant's final settlement with the company he was charged with the

value thereof \$1,546.80. This was objected to and excluded, *held*, no error; that the provision contemplated that the engineer should point out such stone as he deemed fit for masonry and designate the place to which he desired it removed; that plaintiff was entitled to use stone as to which no such designation was made, and as defendant did not offer to prove that plaintiff used stone so pointed out, the first part of the offer was insufficient and so properly rejected; and that the fact that a charge was made by the company against defendant for the stone, was not competent proof of his liability for it. *Read v. Decker*. 189

10. While the circumstances surrounding the execution of a contract cannot be used to contradict what is expressed therein, this rule does not confine the court in construing a contract to the very instrument in question; other contemporaneous writings between the parties, relating to the same subject-matter, are admissible in evidence to explain or qualify the agreement under consideration. *Wilson v. Randall*. 388

11. Defendant and plaintiff's testator, W., contracted for the sale, by the former to the latter, of a certain piece of land. The contract, after describing the land by metes and bounds, thus continues: "containing fifty-four fifteen-hundredths acres of land, be the same more or less, for the sum of three hundred and fifty dollars per acre," which W. agreed to pay. When the deed was executed, defendant claimed that the surveyor had made a mistake, that there was in fact fifty-six fifteen one-hundredths acres; the purchase-price for that quantity at the agreed price per acre was inserted as the consideration in the deed, and was paid by W. Following the description in the deed were the words, "containing fifty-six and fifteen one-hundredths acres of land, be the same more or less." There was, in fact, but forty-eight forty-seven one-hundredths acres in the piece.

In an action to recover back the payment in excess of the purchase-price of the actual quantity, *held*, that taking the contract and deed together, it appeared that the sale was by the acre, not by the piece, and that plaintiff was entitled to recover. *Id.*

*See* SPECIFIC PERFORMANCE.  
BUILDING CONTRACT.

— *When not void for indefiniteness.*

*See* Van Woert v. A. and S. R. R. Co. 538

CONVERSION.

1. Plaintiff's complaint alleged, in substance, that he pledged certain bonds to defendant as security for advances to be made; that he tendered the amount advanced and demanded the bonds, but defendant refused to deliver, and converted them to his own use. The answer denied these allegations, and set up, in substance, that the bonds were delivered to defendant with authority to sell, etc. Upon the trial, defendant offered to prove that plaintiff did not own the claim in suit. This was objected to on the ground that it was not set up in the answer, and objection sustained. *Held*, no error; that in the absence of an averment of title in a third person, with which defendant connected himself, or that plaintiff was not the real party in interest, the evidence offered was inadmissible. *Smith v. Hall.* 48

2. Also *held*, that a counter-claim was not proper, as the action was for conversion; and that plaintiff, by replying to a counter-claim, did not waive the objection. *Id.*

CORPORATION COUNSEL  
(NEW YORK, CITY OF).

— *Salary of.*  
*See* O'Gorman v. Mayor, etc. 486

COSTS.

Where proceedings are instituted by a railroad corporation to con-

demn various pieces of land belonging to different owners, all being described in one petition, and the case as to all is heard together, although separate orders are entered as to each owner, there is but one proceeding, and all the orders may be reviewed upon one appeal; so, also, where the orders are affirmed at General Term, and separate orders of affirmance entered, costs for but one case are proper. *In re P. P. and C. I. R. R. Co.* 371

COUNTER-CLAIM.

This action was brought upon a promissory note made by C. and indorsed for his accommodation by defendant's testator. The firm in which C. was a partner made an assignment for the benefit of creditors to plaintiff, giving preferences, defendant's testator being one of the preferred creditors. Defendant claimed that plaintiff had collected, as assignee, sufficient to pay the preferred debts. This claim was disputed and there had been no settlement of plaintiff's accounts, as assignee. *Held*, that defendant could not, in this action, compel an application by plaintiff of the funds in his hands, as assignee, toward the payment of the note; that the amount in his hands applicable for that purpose could only be determined by an accounting, and the assignee was entitled to have his entire account settled in one accounting, which should protect him against all the parties who could claim under the assignment; he could not be compelled to account separately to each creditor. *Bailey v. Bergen.* 346

— *Not proper in action for conversion.*

*See* Smith v. Hall. 48

COUNTIES.

1. The provision of the "act to reduce the number of town officers," etc. (§ 26, chap. 180, Law of 1845, as amended by § 13, chap. 455, Laws of 1847), providing for the payment of the fees of magistrates and other officers for certain

*Titus v. Inhabitants of H.* (97 Mass., 268) distinguished. *Macaulay v. Mayor, etc., of N. Y.* 608

*Horton v. City of T.* (97 Mass., 266) distinguished. *Macaulay v. Mayor, etc., of N. Y.* 608

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### CAUSE OF ACTION.

1. The court will not sustain an action to restrain a prosecution to recover a penalty imposed by statute, on the ground of the invalidity of the statute, at least until its invalidity has been determined in a previous action. *Wallack v. Society, etc.* 23
2. Nor can an action to restrain such prosecution be sustained as a bill of peace, where the plaintiff brings it in his own behalf, and not also in behalf of others claiming the same right. *Id.*
3. So, also, a court of equity will not issue an injunction restraining defendant from applying to such court for equitable relief in the same matter; especially where such relief is expressly authorized by a statute, the validity of which has not been judicially questioned. *Id.*
4. Accordingly *held*, that even assuming the unconstitutionality of the act of 1872, "regulating places of amusement in the city of New York" (chap. 836, Laws of 1872), plaintiff, a theatrical manager, could not maintain an action to restrain defendant, "The Society for the Reformation of Juvenile Delinquents," etc., from suing for the penalty imposed by said act upon any person exhibiting a dramatic exhibition without a license, or from enjoining such an exhibition. *Id.*
5. Defendant made, in one of its streets upon which was situated a lot belonging to plaintiff, a gutter and curb, which ended opposite plaintiff's lot, and which con-

ducted the water of the ward down that street; the water having no outlet, flowed upon plaintiff's lot, flooding his house, etc. Before this gutter was made there was a natural course which took off the water another way. A drain could have been made to carry it off. In an action to recover the damages, *held*, that the facts established a cause of action. *Byrnes v. City of Cohoes.* 204

6. The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply where the necessity for the drainage is caused by the act of the corporation itself. *Id.*
7. Plaintiff, an expressman, sought passage upon defendant's boat for the purpose, among other things, of taking, while on the boat, orders from the passengers for the delivery of baggage. Defendant had granted the privilege of transacting this business on the boat to another, and as plaintiff continued it after having been directed to desist, and refused to promise to discontinue it, defendant caused him to be ejected from its boat, and refused him passage. In an action to recover damages, *held*, that defendant's action was justifiable, and that it was not liable. *Barney v. O. B. and H. Sbt Co.* 301
8. Defendant and plaintiffs' testator, W., contracted for the sale, by the former to the latter, of a certain piece of land. The contract, after describing the land by metes and bounds, thus continues: "containing fifty-four fifteen-hundredths acres of land, be the same more or less, for the sum of three hundred and fifty dollars per acre," which W. agreed to pay. When the deed was executed, defendant claimed that the surveyor had made a mistake, that there was in fact fifty-six fifteen one-hundredths acres; the purchase-price for that quantity at the agreed price per acre was inserted as the consideration in the deed, and was paid by W. Following the description in the deed were the words, "containing fifty-six and fifteen one-hundredths acres of land, be the same more or

less." There was, in fact, but forty-eight forty-seven one-hundredths acres in the piece. In an action to recover back the payment in excess of the purchase-price of the actual quantity, *held*, that taking the contract and deed together, it appeared that the sale was by the acre, not by the piece, and that plaintiff was entitled to recover. *Wilson v. Randall.* 338

9. Where one holding securities in pledge for a loan, in pursuance of a sale thereof made by the owner, delivers the same to the purchaser, receives the purchase-price, and after deducting the amount of the loan pays over the residue to the owner, this is not an affirmation by the pledgee of the genuineness of the securities, and, in the absence of fraud, an action cannot be sustained against him by the purchaser to recover back the purchase-price in case the securities prove to be forgeries. *Baker v. Arnot.* 448

—To restrain collection of illegal assessment.

*See Hassan v. City of R.* 528

#### CERTIORARI.

1. Although there may be no statutory limitation of time for bringing a common-law *certiorari*, the writ and proceedings based upon it have no office to perform when there is no legal right that can be enforced or protected by it. *People ex rel. Gray v. Phillips.* 582.
2. Under the provisions of the act authorizing the bonding of certain towns in aid of the Lake Ontario Shore Railroad (chap. 811, Laws of 1868; amended by chap. 241, Laws of 1869), proceedings for bonding the town of Y. were completed and the requisite papers filed in the office of the county clerk August 25, 1870. The commissioners of the town, acting thereon, subscribed for stock in November, 1871, and in May, 1872, paid for the same by delivering town bonds to the full amount. During that year the board of supervisors of the county made

provision by tax for payment of the interest for the ensuing year, and a semi-annual installment was paid in April, 1873. The relators, tax-payers of said town, in August, 1873, proceeded by a common-law writ of *certiorari*, directed to the county clerk, the commissioners and assessors, to review their proceedings, and the General Term affirmed the proceedings. *Held* (EARL, J., dissenting), that the assessors, whose official action alone it could be at all important to review, were in all matters brought up by the writ *functus officio* when it was issued, and their powers and duties could not be revived, or their action nullified so as to affect the rights or title of holders of the bonds, or the liability of the town thereon by any judgment upon the writ, that the relators had no rights which could be affected by any such judgment; and that the writ should have been quashed; but, as the judgment of affirmance was for all practical purposes a nullity, that an appeal therefrom brought up nothing for review, or upon which a judgment could be given enforceable by execution, and, therefore, that the appeal should be dismissed. *Id.*

3. Also, *held*, that under said statute it was in the application to the county judge for the appointment of commissioners, if anywhere, that it should be made to appear that the town was "situate along the route" of said railroad, the duty of the assessors being limited to the examination of the consents, and determining whether the requisite number of tax-payers had assented to bonding the town; and as said application was not before the court, or the title of the commissioners challenged, the question as to whether there was a defect in showing the location of the town was not presented. *Id.*

#### CHALLENGE.

1. The provision of the act of 1873 (chap. 475, Laws of 1873), providing that a present opinion or impression in reference to the guilt

or innocence of a prisoner, or the expression of such an opinion, shall not, in the cases specified, be a sufficient ground of challenge for principal cause, does not interfere with or affect the challenge for favor. *Thomas v. People*. 218

2. Under the provisions of the act of 1873 (chap. 427, Laws of 1873), providing that either party may except to the determination of the court upon a challenge for favor, and that the court may review such decision upon writs of error or *certiorari*, this court, upon writ of error, has the same power to pass upon the question involved in the challenge which the trial court had. *Id.*

#### CLERK (EIGHTH DISTRICT COURT N. Y. CITY).

1. Both by the special statute (chap. 217, Laws of 1866) and the general statutes (chap. 514, Laws of 1851; chap. 344, Laws of 1857) relating to the term of office of the clerk of the Eighth District Court of the city of New York, such term is for a period of six years, and is not dependent upon the expiration of the term of office of the justice of said court. *People ex rel. v. Leask*. 521
2. The act of 1872 (§ 1, chap. 438, Laws of 1872) changed the provisions of the act of 1866 by providing another appointing power and by fixing the time of appointment and the commencement of the new term (*i. e.*, immediately after the passage of the act), but it left untouched the duration of the term. *Id.*
3. Accordingly, *held*, that the relator, who was appointed clerk of said court by the then justice thereof in May, 1872 (after the passage and in pursuance of said act of 1872), was entitled to a term of six years, and could not be removed before the expiration thereof by the justice succeeding the one who made the appointment. *Id.*

#### CODE OF PROCEDURE.

- § 11. *See Pennie v. C. Life Ins. Co.*, 278.
- § 11. *See Wheeler v. Scofield*, 311.
- § 11. *See Roosevelt v. Linkert*, 447.
- § 11. *See Patten v. N. Y. E. R. Co.*, 484.
- § 150. *See Bruce v. Burr*, 237.
- § 268. *See Produce Bk. v. Morton*, 199.
- § 282. *See U. D. S. Inst. v. Dur-yea*, 84.
- § 294. *See Produce Bk. v. Morton*, 199.
- § 390. *See Edington v. Mut. L. Ins. Co.*, 185.
- § 401. *See Phillips v. Wheeler*, 104.
- § 463. *See People ex rel. Demarest v. Fairchild*, 334.

#### COMMISSIONER OF JURORS OF NEW YORK.

1. The provision of the act of 1869 providing for the government of the county of New York (§ 7, chap. 875, Laws of 1869) which prohibits the board of supervisors of said county from increasing salaries, "except as provided by acts of the legislature," does not apply where the legislature has expressly authorized said board to increase the salary. *Taylor v. Mayor, etc.* 87
2. Accordingly, *held*, that a resolution of said board passed December 28, 1869, under the authority of the act of 1855, in relation to the salaries of certain judicial officers (§ 1, chap. 575, Laws of 1855), authorizing it to increase the salaries of the city judge and other officers, which resolution increased the salary of the city judge to \$15,000 a year, to take effect January 1, 1870, was valid; and that under the provision of the act of 1870 relating to jurors for the city and county of New York (§ 17, chap. 539, Laws of 1870), providing that the salary of the commissioner of jurors "shall be at the same rate as the salary paid to the city judge," the said commissioner was entitled to a salary of \$15,000 per annum. *Id.*
3. Also, *held*, that the act of 1872 (chap. 367, Laws of 1872) confirm-

ing said resolution was not controlling to show that the resolution was invalid prior thereto, but was in the nature of a declaratory act.

*Id.*

4. Also, *held*, that the fact that the city judge, either by accident or design, was not actually paid at the rate of \$15,000 after January, 1870, did not affect the rights of said commissioner of jurors; the intent was to give him the salary the city judge was entitled to, and whether the latter officer received it or not was immaterial. *Id.*

5. Prior to the passage of the city charter of 1873 (chap. 385, Laws of 1873) the office of commissioner of jurors was not a city office, and the provision of said act (§ 97) authorizing the board of apportionment to reduce the salary of all officers paid from the city treasury, "whose offices *now* exist," did not apply to such office, as it only included city offices then existing, not those made city offices by the act itself. *Id.*

6. Accordingly, *held*, that a resolution of the board of apportionment fixing the salary of said commissioner at \$5,000 on July 1, 1873, was invalid. *Id.*

7. *It seems*, that a resolution of the board of apportionment that the salary of a city officer "be fixed" at a less sum than that theretofore paid has the effect to reduce the salary, the same as if the word "reduce" had been used in the resolution. *Id.*

8. Plaintiff, who at the time of the passage of said charter of 1873 was commissioner of jurors, continued to discharge the duties of the office after April 1, 1873, the time when, by the provisions of said charter (§ 117), his term of office expired, and up to April 1, 1874, no successor having been appointed, *held*, that this was to be regarded as a holding over under the provisions of the Revised Statutes (1 R. S., 117, § 9); and that plaintiff was entitled to his salary up to the time he ceased to act. *Id.*

## COMMON CARRIERS.

1. A common carrier of passengers may establish on his car or vessel an agency for the delivery of passengers' baggage, and may exclude all other persons from entering upon it for the purpose of soliciting or receiving orders from passengers in competition with such agency. *Barney v. O. B. and H. Rbt. Co.* 301
2. Plaintiff, an expressman, sought passage upon defendant's boat for the purpose, among other things, of taking, while on the boat, orders from the passengers for the delivery of baggage. Defendant had granted the privilege of transacting this business on the boat to another, and as plaintiff continued it after having been directed to desist, and refused to promise to discontinue it, defendant caused him to be ejected from its boat, and refused him passage. In an action to recover damages, *held*, that defendant's action was justifiable; and that it was not liable. *Id.*

## COMMON SCHOOLS.

The power given to school district trustees to contract with and employ teachers (chap. 555, Laws of 1864) is not limited to an employment during the trustees' term of office; but a contract with a teacher for a period extending beyond their term, if made in good faith, without fraud or collusion, and for a reasonable period, is valid and binding upon their successors. *Wait v. Ray.* 86

## CONDITIONS.

— *When forfeiture by breach of, waived.*  
*See Cook v. Wardens, etc.* (Mem.) 594

## CONSTITUTIONAL LAW.

1. The act of 1873 (chap. 531, Laws of 1873) is not amenable to the constitutional objection (Const., art. 2,

- § 16) that it embraces more than one subject. The title to the act is expressive of the subject, which is to open certain lands for public use, and the different provisions are but the details of that subject. *In re P. P. and C. I. R. R. Co.* 872
2. So, also, the act of 1874 (chap. 448, Laws of 1874) entitled "An act for the relief of Park Avenue Railroad Company, in the city of Brooklyn, and to authorize the extension of its tracks through certain streets and avenues in said city," expresses the subject sufficiently for the purposes of said constitutional provision. The subject, *i. e.*, the relief of the company, necessarily includes provisions removing restrictions upon its powers, and giving it greater powers. *Id.*
3. The constitutional provision (art. 8, § 1) in reference to the formation of corporations does not render a special charter, or a special addition to a charter taken under a general law, unconstitutional. *Id.*
4. The subdivision 4, added to section 11 of the Code in 1865, allowing an appeal from a decision of a motion which involved the constitutionality of a State law, was repealed by the amendment of said section in 1867, which added as subdivision 4 a new and different provision; the subdivision, as thus enacted, took the place of the same subdivision as it had previously existed. *Patten v. N. Y. El. R. R. Co.* 484
5. *It seems* that the subdivision so repealed did not apply to a decision of the New York Common Pleas. *Id.*
6. There is no constitutional objection to the creation by the legislature of statutory liens in favor of mechanics and others, for the purposes, and under the circumstances and limitations specified in the statutes known as mechanics' lien laws. *Glacius v. Black.* 563
7. The act entitled "An act in relation to that portion of the Great Western Turnpike road, commonly known as Western avenue," etc. (chap. 445, Laws of 1876), is not obnoxious to the constitutional provision (State Const., art. 8, § 16) requiring that local and private bills shall embrace but one subject which shall be expressed in the title. The act simply authorizes a conveyance by the turnpike company, and an acceptance by the commissioners of Washington park, of a portion of the turnpike road, and empowers the latter to improve the same as an approach to the park, and makes provision for such improvement. The whole relates solely to that portion of the road specified in the title, and the purpose of the act is confined to the one subject, which is sufficiently expressed in the title. *People ex rel. Com'rs v. Banks.* 569
8. The legislature is not subject to judicial control in respect to the form or mode in which the "subject" of a bill shall be "expressed" in its title; if expressed, the Constitution is satisfied, although the title may have been more explicit. *Id.*
9. The authorities upon the question of the sufficiency of the titles to bills, under the said constitutional provision, collated. *Id.*
10. The said statute is not in conflict with the constitutional provision forbidding the passage of a private or local bill "laying out, opening, altering, working or discontinuing roads, highways or alleys." (Art. 3, § 17.) This provision was intended to prevent any interference with the general highway system of the State. The portion of the road effected by the act while a public highway, was the property of a private corporation, and the act provides for that which is not ordinarily done under the general highway laws, and for which no general provision is made; and it is within the legislative power to confide it to the commissioners. *Id.*
11. Said statute is not violative of the constitutional provision declaring that no act shall be passed



making an existing law applicable to, or a part thereof, except by inserting it in the act. (Art. 3, § 17.) This provision does not require the re-enactment of general laws whenever it is necessary to resort to them to carry into effect a special statute. *Id.*

12. The legislature may direct that an assessment for the costs and expenses of a work, specially provided for and directed to be paid by tax, shall be made and collected in the manner provided by general laws. *Id.*

13. Said statute is not in conflict with the constitutional provision prohibiting cities from loaning their money or credit to, or in aid of, any individual, association or corporation. (Art. 8, § 11.) The fact that the city of Albany is in the first instance made to pay the cost of a public burden, to be reimbursed thereafter by tax upon the property benefited, does not constitute the payment a loan to the property owners. *Id.*

— Act of 1866 (chap. 761), authorizing taxation of stockholders of banks, not unconstitutional.

See *People v. Comrs.*

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### CONTRACT.

1. The power given to school district trustees to contract with and employ teachers (chap. 555, Laws of 1864) is not limited to an employment during the trustees' term of office; but a contract with a teacher for a period extending beyond their term, if made in good faith, without fraud or collusion, and for a reasonable period, is valid and binding upon their successors. *Wait v. Ray.* 86

2. Plaintiff purchased of defendant certain railroad bonds, with the option of returning if he became sick of them, in which case defendant agreed to repay the purchase-money. Plaintiff sold the bonds to others, for whom, as the evidence tended to show, he made the investment, giving them the same option; this they exercised,

and plaintiff received back the bonds, tendered them back to defendant and demanded the purchase-money, which defendant refused to repay. In an action to recover the same, *held*, that the transfer by plaintiff did not impair his right to return the bonds. *Wooster v. Sage.* 67

3. Plaintiff did not offer to return the bonds until about three years after his purchase. Plaintiff gave some evidence tending to show that the delay was at the request of defendant; the latter, at the close of plaintiff's evidence, moved for a nonsuit on the ground, among other things, that the agreement was within the statute of frauds, which was denied. The question of time was not afterwards presented, nor was there any request to present it to the jury. *Held*, that the nonsuit was properly denied; that under all the circumstances, as developed, the case did not show conclusively, as matter of law, that the delay was unreasonable; and if it did the point was not available, as there was no exception presenting it. *Id.*

4. Also *held*, that the receipt by defendant of the amount of two coupons upon the bonds did not affect his right of recovery, he accounting for the amount received. *Id.*

5. Evidence as to the amount of damages is not necessary in such an action. *Id.*

6. In an action to recover damages for an alleged breach by defendant of a contract to deliver plaster stone, plaintiff's evidence tended to show that defendant contracted to ship from N. S. and to deliver to plaintiff, at N. Y. or W., 3,000 tons of said stone during the season, the same to be delivered as fast as vessels could be obtained in N. S. to carry them, to be paid for on delivery. Defendant, during the season, shipped two cargoes of the stone to N. Y., delivery of which ~~defendant~~ <sup>plaintiff</sup> upon arrival, demanded and was ready to receive and pay for, but defend-

ant refused to deliver. The court nonsuited plaintiff. *Held*, error; that the right to take the whole season for delivery was limited by the provision to ship as fast as vessels could be obtained; that the proof that defendant had shipped cargoes, which arrived, was evidence that it could have obtained vessels before the close of the season; also, that as plaintiff was ready to receive and pay for the cargoes which did arrive, it was no defence to the action that he was not ready to receive and pay for the balance at the end of the season. *Isaacs v. N. Y. Plaster Works.* 124

7. Where interest has already accrued, the parties may lawfully agree to turn such interest into principal so as to carry interest *in futuro*, and the forbearance will constitute a consideration; but a promise to pay interest upon interest, which is to operate retrospectively, and is supported by no consideration save a moral one resulting from the fact that the interest is in arrear and unpaid, is not valid (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting). *Young v. Hill.* 162

8. *It seems* that it is not necessary to the validity of a promise to pay compound interest that it be in writing. *Id.*

9. Defendant contracted to do the work and furnish materials in constructing tracks for the N. Y. C. and H. R. R. Co. The contract provided "that all stone taken from excavations which may, in the opinion of the engineer be suitable for masonry shall be deposited in some convenient place \* \* \* to be designated by him, and shall be the property of the company." Plaintiff entered into a sub-contract with defendant for a portion of the work. In an action to recover a balance alleged to be due thereon, defendant offered to prove that plaintiff took from excavations and used 1,149 yards of stone, and that in defendant's final settlement with the company he was charged with the

value thereof \$1,546.80. This was objected to and excluded, *held*, no error; that the provision contemplated that the engineer should point out such stone as he deemed fit for masonry and designate the place to which he desired it removed; that plaintiff was entitled to use stone as to which no such designation was made, and as defendant did not offer to prove that plaintiff used stone so pointed out, the first part of the offer was insufficient and so properly rejected; and that the fact that a charge was made by the company against defendant for the stone, was not competent proof of his liability for it. *Read v. Decker.* 182

10. While the circumstances surrounding the execution of a contract cannot be used to contradict what is expressed therein, this rule does not confine the court in construing a contract to the very instrument in question; other contemporaneous writings between the parties, relating to the same subject-matter, are admissible in evidence to explain or qualify the agreement under consideration. *Wilson v. Randall.* 383

11. Defendant and plaintiff's testator, W., contracted for the sale, by the former to the latter, of a certain piece of land. The contract, after describing the land by metes and bounds, thus continues: "containing fifty-four fifteen-hundredths acres of land, be the same more or less, for the sum of three hundred and fifty dollars per acre," which W. agreed to pay. When the deed was executed, defendant claimed that the surveyor had made a mistake, that there was in fact fifty-six fifteen one-hundredths acres; the purchase-price for that quantity at the agreed price per acre was inserted as the consideration in the deed, and was paid by W. Following the description in the deed were the words, "containing fifty-six and fifteen one-hundredths acres of land, be the same more or less." There was, in fact, but forty-eight forty-seven one-hundredths acres in the piece.

In an action to recover back the payment in excess of the purchase-price of the actual quantity, *held*, that taking the contract and deed together, it appeared that the sale was by the acre, not by the piece, and that plaintiff was entitled to recover. *Id.*

*See* SPECIFIC PERFORMANCE.  
BUILDING CONTRACT.

— *When not void for indefiniteness.*

*See* Van Woert v. A. and S. R. R. Co. 538

CONVERSION.

1. Plaintiff's complaint alleged, in substance, that he pledged certain bonds to defendant as security for advances to be made; that he tendered the amount advanced and demanded the bonds, but defendant refused to deliver, and converted them to his own use. The answer denied these allegations, and set up, in substance, that the bonds were delivered to defendant with authority to sell, etc. Upon the trial, defendant offered to prove that plaintiff did not own the claim in suit. This was objected to on the ground that it was not set up in the answer, and objection sustained. *Held*, no error; that in the absence of an averment of title in a third person, with which defendant connected himself, or that plaintiff was not the real party in interest, the evidence offered was inadmissible. *Smith v. Hall.* 48

2. Also *held*, that a counter-claim was not proper, as the action was for conversion; and that plaintiff, by replying to a counter-claim, did not waive the objection. *Id.*

CORPORATION COUNSEL  
(NEW YORK, CITY OF).

— *Salary of.*

*See* O'Gorman v. Mayor, etc. 486

COSTS.

Where proceedings are instituted by a railroad corporation to con-

demn various pieces of land belonging to different owners, all being described in one petition, and the case as to all is heard together, although separate orders are entered as to each owner, there is but one proceeding, and all the orders may be reviewed upon one appeal; so, also, where the orders are affirmed at General Term, and separate orders of affirmance entered, costs for but one case are proper. *In re P. P. and C. I. R. R. Co.* 371

COUNTER-CLAIM.

This action was brought upon a promissory note made by C. and indorsed for his accommodation by defendant's testator. The firm in which C. was a partner made an assignment for the benefit of creditors to plaintiff, giving preferences, defendant's testator being one of the preferred creditors. Defendant claimed that plaintiff had collected, as assignee, sufficient to pay the preferred debts. This claim was disputed and there had been no settlement of plaintiff's accounts, as assignee. *Held*, that defendant could not, in this action, compel an application by plaintiff of the funds in his hands, as assignee, toward the payment of the note; that the amount in his hands applicable for that purpose could only be determined by an accounting, and the assignee was entitled to have his entire account settled in one accounting, which should protect him against all the parties who could claim under the assignment; he could not be compelled to account separately to each creditor. *Bailey v. Bergen* 346

— *Not proper in action for conversion.*

*See* Smith v. Hall. 48

COUNTIES.

1. The provision of the "act to reduce the number of town officers," etc. (§ 26, chap. 180, Law of 1845, as amended by § 13, chap. 455, Laws of 1847), providing for the payment of the fees of magistrates and other officers for certain

criminal proceedings by the towns or cities where the offence was committed, does not embrace the fees of a sheriff as jailer or otherwise. It was intended only to apply to the fees of local officers in preliminary criminal proceedings in cases under the grade of felony; not to affect the liability of a county for services of county officers after commitment, either for trial or upon sentence. *People ex rel. v. Sup'rs Col. Co.* 830.

2. The accounts of a sheriff for receiving prisoners into and discharging them from jail, and for their board while confined therein, are properly county charges. (Tit. 1, art. 1, § 8, chap. 460, Laws of 1847; 1 R. S., 385, § 3.) *Id.*
3. The liability of a county extends not only to such official services in cases strictly criminal, but includes also *quasi* criminal offences, such as violations of city ordinances, the only distinction being that, in the latter cases, instead of the statutory fee, the board of supervisors have power to fix the compensation. *Id.*

#### COUNTY JAIL.

1. A board of supervisors has authority to direct the purchase of such articles of furniture as are necessary to properly equip and furnish the county jail, and an account for articles so purchased is a proper county charge. *Schenck v. Mayor, etc.* 44
2. The supervisors of the county of New York have the same power as to furnishing what is known and recognized by law as the county jail, i. e., "the Ludlow street jail," although such jail may technically be the property of the city; and this is so, assuming that such jail cannot be used for the confinement of criminals sentenced by State courts, and that judgment debtors committed upon executions issued out of courts of record are absolutely bound to support themselves. *Id.*

#### CREDITOR'S SUIT.

1. In an action against three co-partners upon a partnership obligation the summons was served upon two, and judgment was perfected by default against the two served. An execution was issued against the joint property of all the defendants and returned unsatisfied. *Held*, that plaintiff had sufficiently exhausted its remedy at law to entitle it to proceed in equity to reach joint property. (Code, § 294.) *Produce Bank v. Morton.* 199
2. Also, *held*, that an order correcting the defect in the entry of judgment *nunc pro tunc*, made after the commencement of the equitable action, was valid and effectual. *Id.*
3. A creditor at large cannot maintain an action to enforce a resulting trust, under the statute of uses and trusts (1 R. S., 728, § 52), in lands purchased and paid for by his debtor, and by direction of the debtor deeded to another; and this is so, although the debtor is dead, and died insolvent. *Estes v. Wilcox.* 264
4. These facts do not dispense with the general rule that a debt must be ascertained by judgment, and legal remedies exhausted, before the creditor can proceed in equity to collect it out of assets liable in equity for its payment. *Id.*

#### CRIMINAL TRIAL.

1. The provision of the act of 1872 (chap. 475, Laws of 1872), providing that a present opinion or impression in reference to the guilt or innocence of a prisoner, or the expression of such an opinion, shall not, in the cases specified, be a sufficient ground of challenge for principal cause, does not interfere with or affect the challenge for favor. *Thomas v. People.* 218
2. Under the provisions of the act of 1873 (chap. 427, Laws of 1873), providing that either party may except to the determination of the

- court upon a challenge for favor, and that the court may review such decision upon writs of error or *certiorari*; this court, upon writ of error, has the same power to pass upon the question involved in the challenge which the trial court had. *Id.*
3. A person, called as a juror upon the trial of an indictment for murder, being challenged, testified that he had heard the killing talked about, had expressed an opinion, and then had an impression or opinion, depending upon the truth of what he had heard; that he thought it would take evidence to remove that impression; but that he would decide the case on the evidence; and believed that he could render an impartial verdict upon the evidence, unbiased by such opinion. *Held*, that the trial court was justified in holding the juror indifferent. *Id.*
  4. Upon the trial, the prisoner offered to prove that the deceased had been engaged in several fights with other parties, in each of which he used a knife, and cut his opponent; also, declarations of his as to his cutting people with razors, and that all these matters had been communicated to the prisoner; the offers were overruled. *Held*, no error. *Id.*
  5. After a witness on the part of the prisoner had testified that he heard the deceased, in an angry dispute, say to the prisoner that, if he ever crossed his path again, he would fix him, the prisoner offered to show that, a few days afterward, the witness heard another person, who was present when the threat was made, state to the prisoner what the deceased threatened. The proof was excluded. *Held*, no error; as there was no suggestion that the prisoner did not hear the threat when made, or had forgotten it. *Id.*
  6. After a witness had testified that the prisoner was a quiet man and good natured, as far as he knew, he was asked to "state what his disposition was when crossed or misused?" This was objected to, and excluded. *Held*, no error. *Id.*
  7. The crime charged was committed in State prison, where the prisoner and the deceased were confined. The prisoner gave evidence tending to show that the character of the deceased, before he came to the prison, was bad; that he was quarrelsome and vindictive. The prosecution then called witnesses, who were permitted to testify, under objection, that, in the respects stated, his character while in prison was good. *Held*, no error. *Id.*
  8. The homicide was committed with a case knife, which the prisoner, a few days before, had ground to a point. He testified that he knew where the heart was located, and that he stuck his knife into it. The court charged, among other things, in substance, that the facts that the prisoner used a deadly weapon, and struck at a vital part of the body of the deceased, are circumstances furnishing presumptive evidence of an intent to take the life of the deceased, but not conclusive. *Held*, no error. At the time of his conviction, the prisoner was under sentence for a term, several years of which were unexpired. *Held*, that this did not prevent his being sentenced to be hung before the expiration of his term. *Id.*
  9. Upon the trial of an indictment for larceny, it appeared that Lewis, one of the prisoners, made the acquaintance of Olason, the prosecutor, and, under the pretence that he had a check for \$500 he desired to get cashed at a bank, invited Olason to go with him; he led him into a saloon, where was the prisoner Loomis, whom the evidence showed to be a confederate of Lewis. Lewis proposed to Loomis to throw dice; they did so for five dollars, and Loomis lost; they then proposed to throw for \$100. Lewis asked Olason to lend him ninety dollars, saying, "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and we will go up to the bank and get the check cashed and you can

have the money." Olason let him have the ninety dollars; the dice were thrown and Lewis lost. Olason insisted on the return of his money; the purported check was then put up against \$100, and Lewis again lost; Loomis and Lewis thereupon went away. The court charged the jury, in substance, that if satisfied beyond a reasonable doubt that the two prisoners conspired fraudulently and feloniously to obtain the complainant's money, and to convert it absolutely without his consent and against his will, they could convict of larceny. *Held*, no error; and that the evidence was sufficient to sustain a conviction. *Loomis v. People*. 322

## DAMAGES.

1. This court cannot interfere with a judgment because excessive damages have been allowed. *Maher v. O. P. N. and E. R. R. Co.* 52
2. Defendant's firm employed plaintiff, as clerk, for a specified period, agreeing to pay him for his services a certain proportion of the profits of the business, he being entitled to receive on account of his salary thirty-five dollars per week. Defendant, without good cause, discharged plaintiff before the expiration of the time fixed. In an action to recover damages for breach of the contract no evidence was given showing profits. The referee allowed plaintiff thirty-five dollars per week for the unexpired time. *Held*, no error; that by defendant's action plaintiff was prevented from assisting, by his services, in making profits, or from proving what they would have been, and, in the absence of evidence that profits could not have been earned had he been allowed to continue in defendant's employment, they were not in position to claim that no profits would have accrued; that, therefore, as the damages could not be based upon proof of profits, and as the contract fixed the minimum estimate of the value of plaintiff's services, this furnished a criterion from which the damages could

fairly be estimated. *Gifford v. Waters et al.* 80

3. Where in an action against a railroad company for unlawfully ejecting a passenger from its cars, the case, as made by plaintiff, is one where punitive damages may be allowed, evidence on the part of the conductor that at the time he ejected plaintiff he believed that plaintiff had not surrendered a ticket entitling him to be carried, also, that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent upon the question of damages. *Yates v. N. Y. C. and H. R. R. Co.* 100
4. In order to present the point of the immateriality of the evidence on the question of compensatory damages, plaintiff's counsel should, when the evidence is offered, disclaim any claim for any further damages. *Id.*
5. Where, in such an action, the verdict is for the defendant, the reception of erroneous evidence on its part, on the subject of damages, is not a ground for reversal, as it could not have produced any inquiry. *Id.*
6. Defendant H. contracted to sell defendant B. certain premises and to advance to him \$9,000 to complete some unfinished houses thereon. B. agreed to finish the houses on or before May 1, 1873, and to give his bonds with mortgages on the premises for the purchase-price, with interest to date from May 1, 1873. The houses were not finished until July, 1874. H. acquiesced in the completion of the work after the time had expired. After their completion no deed was tendered or bonds and mortgages given, but H. took possession and rented the buildings. In an action to foreclose mechanics' liens filed by sub-contractors H. claimed to recoup damages sustained because of the delay in completing the buildings. *Held*, that H. was not entitled, by way of damages, to the rental value of the premises for the time between that fixed for the com-

- pletion of the buildings and the time of their actual completion, as H. was not entitled under the contract to the rents and profits or to the use and occupation of the premises; that the fact that he did receive the rents after the buildings were completed was immaterial, as he did not receive them under the contract; that H. was not entitled to be allowed interest on the purchase-money, as whatever interest he was entitled to by virtue of his contract he was still entitled to from B., and to the security by mortgage for its payment; and, in the absence of proof of special damage, that the lienors were entitled to judgment for the balance unpaid by H. to B. under their contract at the time of filing the liens. *Schuyler v. Hayward*. 254
7. Plaintiff's complaint alleged, in substance, that, by reason of the failure of defendant to keep the privies and drains upon his premises in proper repair the water and filth therefrom was caused to overflow upon plaintiff's premises adjoining and into the cellars of his houses, rendering them unfit for use, interfering with the use of the premises and with the letting thereof and injuring the walls, etc. Upon the trial of the action plaintiff offered evidence to show that he had lost rents in consequence of the flow of the water into his cellars, that the cellars had remained unoccupied since the water came in, and also proof of the rental value of the premises. This was objected to generally and excluded. The court also, in its charge, excluded the rental value of the premises as an element of damages. *Held*, error; that the damages thus sought to be proved, being such as necessarily and naturally resulted from the injury complained of, a special averment thereof in the complaint was not necessary in order to authorize a recovery. *Jutte v. Hughes*. 267
8. Also, *held*, that the allegations in the complaint were sufficient to authorize evidence of the loss of the use of the cellars and of the rental thereof, treating it as special damage particularly as there was no objection on the ground of the insufficiency of the averments. *Id.*
9. The court confined the damages to the injuries done to the walls and cellars. It appeared that plaintiff incurred expenses in plumbing and fixing the sewers, and that other expenses would be required to prevent further injury from the flow of the water; also, that injuries were sustained because of the stench. *Held*, error; that these were proper items of damage. *Id.*
10. The proof showed that defendant had paved his yard and conducted from the roofs of his houses, in leaders and drains to the privies, an unusual quantity of water beyond the capacity of the drains to carry away. The court charged that if the water did issue from the defendant's yard and he did every thing possible under the circumstances and practicable in the way of drainage to carry it off from the premises he was not liable. *Held*, error; that if defendant suffered the water improperly to accumulate on his premises so as to flow upon the plaintiff, it did not relieve him from liability that he did all he reasonably could do to carry it off. *Id.*
11. Also, *held*, that the errors specified were not cured by a verdict for defendant; as it could not be assumed that the result would not have been changed had proper instructions been given on the question of damages. *Id.*
12. In an action brought by a father as administrator, under the statute (chap. 450, Laws of 1847; chap. 256, Laws of 1849), to recover damages for the death of his infant son where the recovery is for his exclusive benefit, he may proceed for and recover his whole damages, including the loss of services of his son during minority. The recovery will be a bar to another action by the father, as such, assuming that he has a right of action independent of the statute. *McGovern v. N. Y. C. and H. R. R. Co.* 418

13. This action was brought by plaintiffs, as judgment creditors of D., to have a prior judgment, in favor of defendants against D., adjudged paid and satisfied, and to restrain them from receiving the avails of an execution sale of the debtor's property. A preliminary injunction was obtained upon the ordinary undertaking, and upon stipulation of the parties, it was ordered that the question of defendants' damages, if any, sustained by reason of the injunction, be heard and determined, jointly with the issues by the referee. No evidence of damages was given on the trial; no findings of fact were made by the referee in regard thereto, nor were any requests made to find. Upon appeal from a judgment in favor of defendants, but allowing no damages, *held*, that the question of damages was not presented by the appeal; but that if presented, in the absence of proof of damages, the referee was right in not allowing anything therefor; that it was not imperative upon the referee to make an allowance for counsel fees, without proof of a payment, or that a liability had been incurred therefor. *Packer v. Nevins*. 550

14. Also *held*, that the provisions of the Revised Statutes (2 R. S., 189, § 141, *et seq.*) requiring a deposit to be made of the amount of a judgment in case of an injunction staying proceedings thereon, did not make the amount of the deposit required the standard for measuring damages in this action, as said provisions applied only to the parties to the action wherein the proceedings were restrained, or their privies; and that even if said provisions were applicable, the deposit was dispensed with by an acceptance of the undertaking, and defendants were left to prove what their damages actually were. *Id.*

— *Evidence of, not necessary in action to recover back purchase-money on rescission of purchase.*  
*See Wooster v. Sage.* 68

## DEATH.

In an action brought by a father as administrator, under the statute (chap. 450, Laws of 1847; chap. 256, Laws of 1849), to recover damages for the death of his infant son, where the recovery is for his exclusive benefit, he may proceed for and recover his whole damages, including the loss of services of his son during minority. The recovery will be a bar to another action by the father, as such, assuming that he has a right of action, independent of the statute. *McGovern v. N. Y. C. and H. R. R. Co.* 418

## DEBTOR AND CREDITOR.

1. Where one of two copartners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes in equity the principal debtor and the latter a surety; and this relationship a firm creditor having notice of the agreement is bound to observe. *Colgrove v. Tallman.* 95
2. Where a creditor, having such notice, is requested by the partner, who thus became surety, to collect his claim, and he refuses or neglects so to do, if, at the time of the request, the principal was solvent and able to pay, but thereafter becomes insolvent, the surety is discharged. *Id.*
3. A creditor at large cannot maintain an action to enforce a resulting trust, under the statute of uses and trusts (1 R. S., 728, § 52), in lands purchased and paid for by his debtor, and by direction of the debtor deeded to another; and this is so, although the debtor is dead, and died insolvent. *Estes v. Wilcox.* 264
4. These facts do not dispense with the general rule that a debt must be ascertained by judgment, and legal remedies exhausted, before the creditor can proceed in equity to collect it out of assets liable in equity for its payment. *Id.*



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[Date]

## DEVISÉ

**See WILLS.**

68

**DISTRICT COURTS (NEW YORK CITY).**

1. The provision of the act of 1873 reorganizing the local government of the city of New York (§ 97, chap. 335, Laws of 1873), which authorizes the board of apportionment to fix the salaries of all officers paid from the city treasury, includes only city officers; *i. e.*, such as are connected with the political organization of the city government. *Whitmore v. Mayor, etc.* 21
2. Clerks of the district courts of the city are not such officers, but judicial officers embraced within the judiciary system of the State. *Id.*
3. Accordingly *held*, that a resolution of the board of apportionment fixing the salaries of such clerks was inoperative, and that they were entitled to the salaries given them by the act of 1872, relating to courts in the city and county of New York. (§ 1, chap. 438, Laws of 1872.) *Id.*
4. Both by the special statute (chap. 217, Laws of 1866), and the general statutes (chap. 514, Laws of 1851; chap. 344, Laws of 1857), relating to the term of office of the clerk of the Eighth District Court of the city of New York, such term is for a period of six years, and is not dependent upon the expiration of the term of office of the justice of said court. *People ex rel. v. Leask.* 521
5. The act of 1873 (§ 1, chap. 438, Laws of 1872), changed the provisions of the act of 1866 by providing another appointing power and by fixing the time of appointment and the commencement of the new term (*i. e.*, immediately after the passage of the act); but it left untouched the duration of the term. *Id.*
6. Accordingly, *held*, that the relator, who was appointed clerk of said court by the then justice thereof in May, 1872 (after the passage and in pursuance of said act of 1872), was entitled to a term

of six years; and could not be removed before the expiration thereof by the justice succeeding the one who made the appointment. *Id.*

**DOMICIL.**

1. In an action to recover damage for the alleged negligent killing of plaintiff's intestate, an infant, it appeared that at the time of the accident, plaintiff, who was the father of the child, lived, and for seven months prior thereto had lived, in New York; he came from England, and his wife and child were coming to join and live with him. *Held*, that the evidence was sufficient to show *prima facie* that he was domiciled in New York; and so that his child was an inhabitant thereof; and that the surrogate of that county properly issued letters of administration to him. *Kennedy v. Ryall.* 380
2. Plaintiff testified that he came to New York for the purpose of making a home and a living there. This was stricken out on motion of defendant's counsel. *Held*, error; that the evidence was proper and material on the question of residence. *Id.*

**DOWER.**

1. The provisions of the Revised Statutes giving a widow damages for withholding dower (1 R. S., 742, § 19, *et seq.*) were intended to prescribe the sole rule to determine the amount thereof; and by and under the statute alone can she now recover, either at law or in equity. *Kyle v. Kyle.* 400
2. As to whether an executor of an heir at law has the right to charge the estate of his testator, or expend the assets in his hands, for the payment of arrears of dower, where dower has not been assigned, *quære.* *Id.*
3. J. died in 1856, intestate, leaving a widow and five children. G. and D., two of the children, bought out the interests of the others in certain real estate of

5. Where different actions have been brought by creditors, in behalf of themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to make an order to compel all the creditors to come in and prove their claims in the suit first brought, or wherein interlocutory judgment is first obtained, and to stay all proceedings in the other actions. *Travis v. Myers.* 542

6. The terms of the order are within the discretion of the court, and cannot be reviewed here. *Id.*

#### DECLARATIONS AND ADMIS- SIONS.

— *Of assured when not competent evidence in action by assignee of policy of life insurance.*

*Edgington v. Mut. L. Ins. Co.* 185

#### DEFENCES.

In action to recover an unpaid balance of subscription to the capital stock of a manufacturing corporation, an abandonment of its business by the corporation, either before or after the commencement of the action, is no defence where it appears that the incorporation is indebted to more than the amount of the subscription, as the action is prosecuted for the benefit of creditors. *Phamz W. Co. v. Badger.* 294

— *Where, in action against vendor for breach of executory contract of sale, it is no defence that vendee was not ready to receive and pay at the end of the time limited for delivery.*

*Isaacs v. N. Y. Plaster Co.* 124

#### DEFINITIONS.

— *"Forthwith," in clause in policy of insurance requiring notice of loss, means within a reasonable time.*

*See Bennett v. Lyc. M. Ins. Co.* 274

— *"False swearing," in condi-*

*tion of fire insurance policy forfeiting it in case of, means a verified false assertion filed and likely to or which does deceive.*

*See Maher v. H. Ins. Co.* 284

— *The literal meaning of the words "hereto annexed," referring to plans, etc., in building contract, not controlling when it is apparent that they were intended to mean hereto referred to.*

*See Cook v. Allen (Mem.)* 578

#### DEPOSITION.

1. *It seems that the question whether a party should be deprived of the benefit of the testimony of a witness, examined de bene esse, for the reason that the adverse party has lost the opportunity of a full cross-examination, should be determined upon the trial, rather than upon motion, where the facts necessary to present the question appear in the deposition as certified to.* *Hewlett v. Wood.* 894

2. Where, however, the question depends upon facts not appearing upon the face of the deposition or the certificate, but which must be established by evidence *abunde*, a motion to suppress the deposition would be proper. *Id.*

3. As to whether, in such case, evidence could be given on the trial of the facts alleged, *quære.* *Id.*

4. The deposition may, in the discretion of the court, be suppressed on motion in advance of the trial. *Id.*

5. Where the opportunity to cross-examine the witness has been lost through his misconduct, or through the fault or omission of the party on whose behalf he is examined, or other like cause, the deposition should be set aside or the testimony rejected. *Id.*

#### DEVISE.

*See WILLS.*

— *Construction of.*  
*See Ackerman v. Gorton.* 68

DISTRICT COURTS (NEW YORK CITY).

1. The provision of the act of 1873 reorganizing the local government of the city of New York (§ 97, chap. 835, Laws of 1873), which authorizes the board of apportionment to fix the salaries of all officers paid from the city treasury, includes only city officers; *i. e.*, such as are connected with the political organization of the city government. *Whitmore v. Mayor, etc.* 21
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2. Plaintiff testified that he came to New York for the purpose of making a home and a living there. This was stricken out on motion of defendant's counsel. *Held*, error; that the evidence was proper and material on the question of residence. *Id.*

DOWER.

1. The provisions of the Revised Statutes giving a widow damages for withholding dower (1 R. S., 742, § 19, *et seq.*) were intended to prescribe the sole rule to determine the amount thereof; and by and under the statute alone can she now recover, either at law or in equity. *Kyle v. Kyle.* 400
2. As to whether an executor of an heir at law has the right to charge the estate of his testator, or expend the assets in his hands, for the payment of arrears of dower, where dower has not been assigned, *quære.* *Id.*
3. J. died in 1856, intestate, leaving a widow and five children. G. and D., two of the children, bought out the interests of the others in certain real estate of

which J. died seized, and subsequently G. conveyed his interest to D. D. died in March, 1871, leaving a will of which G. was executor; he, in January, 1873, allowed to the widow of J., for the arrears of her dower, the value of the use of one-third of the real estate for six years prior to the testator's death, and gave his promissory note to her for the amount, deducting a sum paid by the testator in his lifetime. No dower had been admeasured or demanded, and no action to recover the same had been commenced. The amount of the note was allowed to the executor on settlement of his accounts by the surrogate. *Held*, error; that the allowance, if it could be sustained at all, must stand in the place of a judgment for damages; and, as the said statute (§ 20) only allows damages to be estimated for six years prior to a judgment therefor, the allowance could only be for a period beginning six years prior to the time it was made, and ending at the testator's death, about four years and two months; also, that as, by said statute (§ 20), the widow is only entitled to recover damages of other persons than the heirs of her husband, from the time of demanding dower of them, and as, although the testator was an heir, yet he inherited but an undivided one-fifth, and derived title to four-fifths of the lands by grant, for the value of the use of those four-fifths he was liable only from the time demand was made; and, no demand having been made, he was only liable for one-fifth of the use for the period above stated; and that, therefore, the executor had no authority to pay the widow her damages out of the assets of the estate, upon the basis adopted, still less to charge the estate by an executory contract to make such payment. *Id.*

4. In the deed from the three other children to G. and D., it was stated to be the intent to leave the right of dower in the lands to be adjusted and arranged by the grantees. *Held*, that the obligation thus imposed upon the gran-

tees was joint, and G. had no right or power, as executor of the estate of D., to put the whole burden upon it to the relief of himself. *Id.*

## ELECTIONS.

1. The office of chief supervisor of elections, created by the act of congress, passed February 28, 1871 (16 U. S. Stat. at Large, 437), is additional to that of Circuit Court commissioner and not incident or appurtenant thereto. It is therefore within the provisions of the New York charter of 1870 (§ 114, chap. 335, Laws of 1870), which declares that the acceptance of office under the federal government is a relinquishment of any office held under the city; and is not within the exception in said section in favor of commissioners. *Davenport v. Mayor, etc.* 456
2. Accordingly *held*, that plaintiff, by accepting the office of chief supervisor of election, vacated the office of counsel to the health department, then held by him, and was not entitled to the salary of the latter office after such acceptance. *Id.*

## EMINENT DOMAIN.

1. The fact that a railroad corporation is in possession of lands as lessee under an unexpired lease is no impediment to proceedings on its part under the general railroad act to acquire title in fee; the condemnation of the title does not impair the obligation of a covenant to surrender, or any other covenant in the lease, but simply transfers them with the title. *Kip v. N. Y. and H. R. R. Co.* 227
2. Where, after the commencement of proceedings by a railroad corporation to acquire title to lands, it leases its road to another company for a long term of years, the lease does not, *per se*, operate to abrogate the proceedings; the land sought to be condemned may be as necessary, for the purposes of

the corporation instituting the proceedings, after as before the lease; but if the necessity is only in favor of the lessee, it is competent for it to continue the proceedings in the name of the lessor. *Id.*

3. After the confirmation of the report of commissioners of appraisal appointed in proceedings instituted by a railroad corporation under the general railroad act (chap. 140, Laws of 1850) to acquire lands for the purposes of its road, the corporation cannot, without leave of the court, abandon the proceedings and refuse to pay the award made to the owner. Upon confirmation of the report mutual rights become vested in the parties and the corporation cannot, of its own option, recede. The confirmation determines the rights of both parties subject only to the right of review as to the amount of appraisal. *In re R. and C. R. R. Co.* 242

4. It is not necessary, in order to conclude the corporation, that the title to the land should have vested in it under the proceedings. It is sufficient if the right to acquire it on payment of the award is fixed. *Id.*

- 5 The fact that a railroad corporation has constructed and commenced operating its road in reliance upon a title subsequently found to be defective, is no objection to proceedings on its part to perfect its title to lands so occupied, under the provision of the general railroad act (§ 21, chap. 140, Laws of 1850) authorizing railroad corporations to perfect defective titles. *In re P. P. and O. I. R. R. Co.* 871

6. Although a highway is devoted to one public use, the legislature may, by special enactment, devote it, concurrently, to another public use, so far as declaring a necessity for that other use is concerned. *Id.*

7. The provision of the general railroad act (§ 13), making it a prerequisite to proceedings *in invitum* to acquire title to lands that the

company shall be "unable to agree for the purchase," does not mean an impossibility to purchase at any price, however large, but that the owner must be either unwilling to sell at all, or only willing to sell at a price which, in the judgment of the agents of the corporation, is excessive. *Id.*

8. An amendment of the petition of a railroad corporation, in proceedings to acquire title to lands, so as to ask for a less quantity of land, made upon the hearing at Special Term, does not make necessary a further attempt at agreement on a price, at least, where the owners are represented in court, and no suggestion is made in their behalf of a withdrawal of opposition, or for a suspension of proceedings with a view to such an attempt. *Id.*

## EQUITY.

— *When court of, will not restrain defendant from applying for equitable relief.*

*See Wallack v. Society, etc.* 83

## ERROR (WRIT OF).

*See WRIT OF ERROR.*

## ESTOPPEL.

1. In an action to recover an unpaid balance of a subscription to the capital stock of a manufacturing corporation, where it appears that defendant subscribed for the stock, acted as a trustee of the corporation, took part in its management and contracted with it as a corporation, he cannot dispute the validity of the incorporation. *Phoenix W. Co. v. Badger.* 294

2. P. and wife executed a mortgage upon premises of which the former had possession under a contract of sale, which mortgage was duly recorded. P. thereafter received a deed, which was recorded; the mortgage was assigned to plaintiff's testator. P.

subsequently sold and conveyed the premises, receiving from the grantee a mortgage for a part of the purchase-money, which was duly recorded; the grantee had notice of the prior mortgage. P. assigned his mortgage to defendant T., assuring him that the mortgage was the first lien. T. searched the records back to the deed to P. In an action to foreclose the first mortgage, T. claimed that his mortgage was entitled to priority. *Held*, untenable; that as P. would be estopped from claiming a priority if he had retained the mortgage, his assignee had no superior right and was also estopped; and that the fact that the records showed a perfect chain of title sustaining T.'s mortgage gave it no precedence. *Crane v. Turner*. 487

8. One R. agreed with the agent of defendants' testator A. for a loan for sixty days upon certain forged railroad bonds. The agreement was for a loan of eighty-five per cent on the face of the bonds for sixty days at one and one-half per cent per month, with seven per cent rebate in case the loan was taken up before, R. having the privilege of taking it up at any time. After the terms of the loan were settled, the agent proposed that to avoid trouble the bonds should be sold to A. direct, he giving a contract to sell them back in sixty days for the amount of the loan and the sum agreed to be paid therefor. This form of the transaction was accordingly adopted, the bonds delivered, the money advanced and the contract signed and delivered on behalf of A. R. subsequently contracted to sell the bonds to plaintiff; the bonds were delivered by A.'s agent, who received the purchase-money, deducted the amount due A. and paid over the residue to R. In an action to recover back the purchase-money, *held*, that, whether the loan was usurious or not, A. had no title to the bonds, save as pledgee, the title remaining in R., who had the right to sell them and to require A. to deliver at any time on being paid the loan; that the

question of usury was one between R. and A., which in no manner affected the rights of plaintiff; that defendants were not estopped from setting up the real transaction, because the form of a sale was resorted to to evade the usury laws; and that they were not responsible for the genuineness of the bonds. *Baker v. Arnot*. 449.

4. In an action by a bank to recover back money paid upon a raised check, plaintiff is not estopped from alleging the forgery by the fact that its teller at the time the check was presented for certification upon doubts being expressed in regard to it by the person presenting it, stated that it was right in every particular. It is no part of a teller's duty to give an assurance as to the genuineness of a check, except in respect to the signature of the drawer; and beyond that the bank is not bound by his representations. *Security Bk. v. Nat. Bk. Republic*. 458

— When agent having voluntarily performed contract for principal estopped from claiming benefit of contract.

*See Fowler v. N. Y. G. E. Bk.* 138

— Of parties to action from questioning judgment.

*See Lyon v. Lyon*. 250

— When insured not estopped by statements in proofs of loss.

*See Cummins v. Ag. Ins. Co.* 260

— Extension of time of payment of premium estops from claiming forfeiture of life insurance.

*See Homer v. G. M. L. Ins. Co.* 478

## EVICITION.

1. Plaintiff's complaint alleged, in substance, that he pledged certain bonds to defendant as security for advances to be made; that he tendered the amount advanced and demanded the bonds, but defendant refused to deliver, and converted them to his own use. The answer denied these allegations, and set up, in substance, that the bonds were delivered to defendant with authority to sell, etc. Upon the trial, defendant offered to

prove that plaintiff did not own the claim in suit. This was objected to on the ground that it was not set up in the answer, and objection sustained. *Held*, no error; that in the absence of an averment of title in a third person, with which defendant connected himself, or that plaintiff was not the real party in interest, the evidence offered was inadmissible. *Smith v. Hall*. 48

2. One who has himself rendered services to another is competent to give evidence as to the value of the services. *Mercer v. Vose*. 56

3. Witnesses having peculiar knowledge as to services rendered, and some general knowledge of the value thereof, may give opinions as to the value, based either upon their own knowledge or upon a hypothetical case, including some or all of the facts proved. *Id.*

#### EVIDENCE.

1. Where, in an action against a railroad company for unlawfully ejecting a passenger from its cars, the case, as made by plaintiff, is one where punitive damages may be allowed, evidence on the part of the conductor that at the time he ejected plaintiff he believed that plaintiff had not surrendered a ticket entitling him to be carried, also, that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent upon the question of damages. *Yates v. N. Y. C. and H. R. R. Co.* 100

2. In order to present the point of the immateriality of the evidence on the question of compensatory damages plaintiff's counsel should, when the evidence is offered, disclaim any claim for any further damages. *Id.*

3. Defendant contracted to do the work and furnish materials in constructing tracks for the N. Y. C. and H. R. R. Co. The contract provided "that all stone taken from excavations which may, in the opinion of the engineer, be

suitable for masonry, shall be deposited in some convenient place \* \* \* to be designated by him, and shall be the property of the company." Plaintiff entered into a sub-contract with the defendant for a portion of the work. In an action to recover a balance alleged to be due thereon, defendant offered to prove that plaintiff took from excavations and used 1,149 yards of stone, and that in defendant's final settlement with the company he was charged with the value thereof, \$1,546.80. This was objected to and excluded, *held*, no error; that the provisions contemplated that the engineer should point out such stone as he deemed fit for masonry and designate the place to which he desired it removed; that plaintiff was entitled to use stone as to which no such designation was made, and as defendant did not offer to prove that plaintiff used stone so pointed out, the first part of the offer was insufficient and so properly rejected; and that the fact that a charge was made by the company against defendant for the stone, was not competent proof of his liability for it. *Read v. Decker*. 183

4. Where, in a policy of life insurance, it is stated that the insurance is made in consideration of the representations in the application, but the application is not made a part of the policy, or, in any other manner, referred to therein, it is not error to admit the policy in evidence, on the part of the plaintiff, in an action brought upon it, without production of the application. If any question is raised by defendant thereon, it more properly belongs to it to introduce the application in evidence. *Edington v. Mut. L. Ins. Co.* 185

5. An error in admitting a policy in evidence without the application, is cured by the introduction of the application in evidence by the defendant. *Id.*

6. Declarations and admissions of the assured as to his condition of health, made at a time prior to and remote from the application, and not in connection with some act



or fact showing his state of health, are not competent, in an action by an assignee upon the policy, for the purpose of disputing representations in the application. *Id.*

7. The provision of the Revised Statutes (2 R. S., 406, § 73) prohibiting a physician from disclosing any information received by him necessary to enable him to prescribe for a patient includes not only information from statements of the patient, but such knowledge as the physician may acquire from the patient, from statements of others present at the time, or from his own observation of the patient's symptoms and appearance. *Id.*
8. It will be presumed, from the relationship of the parties that information so imparted was given or obtained for the purpose of enabling the physician to prescribe for the patient, and so, that it was material. *Id.*
9. Accordingly, *held*, in an action upon a policy of life insurance, that an offer, upon the part of defendant, to prove by a physician, who had been consulted professionally by the assured, that prior to the application he was afflicted with certain diseases for which the witness treated him, was properly excluded, although the testimony was expressly limited to what the witness knew, independent of any information given or statements made by the assured. *Id.*
10. The right of objecting to the disclosure of such privileged communications is not limited to the patient and his personal representations, but an assignee may exercise it, and his right is not affected by the decease of the patient. *Id.*
11. The statutory prohibition above referred to is not repealed by the section of the Code (§ 390) authorizing the examination of an adverse party as a witness. *Id.*
12. One C. contracted to erect a building on defendant's premises, eighty per cent of the contract-price to be paid during the progress of the work, the residue when it was completed. After the eighty per cent was paid, a mechanic's lien was filed for materials furnished to C. In an action to foreclose the same defendant offered to prove that the contractor became unable to complete the building, and, after the filing of the lien, defendant, in order to complete it, was forced to, and did, purchase materials and pay for labor to an amount exceeding the residue unpaid. The evidence was excluded. *Held*, error; that expenditures made under such circumstances could not be treated as payments to the contractor upon his contract, which would, under the mechanic's lien law of 1854 (chap. 412, Laws of 1854, as amended by chapter 558 of Laws of 1869) render the owner liable to a material-man, even although there was no formal abandonment of the contract. *Rodbourn v. S. L. G. and W. Co.* 215
13. Upon the trial, the prisoner offered to prove that the deceased had been engaged in several fights with other parties, in each of which he used a knife, and cut his opponent; also, declarations of his as to his cutting people with razors, and that all these matters had been communicated to the prisoner; the offers were overruled. *Held*, no error. *Thomas v. People.* 218
14. After a witness on the part of the prisoner had testified that he heard the deceased, in angry dispute, say to the prisoner that, if he ever crossed his path again, he would fix him, the prisoner offered to show that, a few days afterward, the witness heard another person, who was present when the threat was made, state to the prisoner what the deceased threatened. The proof was excluded. *Held*, no error; as there was no suggestion that the prisoner did not hear the threat when made, or had forgotten it. *Id.*
15. After a witness had testified that the prisoner was a quiet man and

good natured, as far as he knew, he was asked to "state what his disposition was when crossed or misused?" This was objected to, and excluded. *Held*, no error. *Id.*

16. The crime charged was committed in State prison, where the prisoner and the deceased were confined. The prisoner gave evidence tending to show that the character of the deceased, before he came to the prison was bad; that he was quarrelsome and vindictive. The prosecution then called witnesses, who were permitted to testify, under objection, that, in the respects stated, his character while in prison was good. *Held*, no error. *Id.*

17. While the circumstances surrounding the execution of a contract cannot be used to contradict what is expressed therein, this rule does not confine the court in construing a contract to the very instrument in question; other contemporaneous writings between the parties, relating to the same subject-matter, are admissible in evidence to explain or qualify the agreement under consideration. *Wilson v. Randall.* 388

18. In an action by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the custom and common understanding of banks and merchants the words "certified" at the time of the certification, when used in the certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, is inadmissible. *Security B'k v. Nat. B'k of Republic.* 458

19. This action was brought, among other things, to recover for plaintiff's services as attorney, alleged to have been rendered to L., defendants' testator. The defence was, that the services were rendered for one B. Upon the trial plaintiff was allowed to testify,

under objection, that he was introduced by B. to L.; that B. and L. talked of a power of attorney they had given, and that they agreed, on the advice of the witness, to revoke it, which was done; also, that at another time when L., his brother, and witness were present, L. said to his brother "we cannot tell what we will have to pay until we know what our lawyer's charges are," turning his head to the witness. *Held*, error; that the evidence was incompetent, it being in regard to personal communications and transactions within the meaning of section 399 of the Code. *Brague v. Lord.* 495

— *Inability to find order confirming assessment not conclusive proof that it was not made; may be established by other proof.*

*See Fisher v. Mayor, etc.* 73

— *Entry made by corporation attorney of the making of order competent evidence after his death, but not competent when death not proved.*

*See Fisher v. Mayor, etc.* 73

— *On part of agent who has performed contract for principal, of cost of performance proper in action by principal to recover profits.*

*See Fowler v. N. Y. G. Ex. Bk.* 138

— *Of intent, proper on question of domicile.*

*See Kennedy v. Ryall.* 880

## EXCEPTION.

1. Where exceptions have been taken upon a trial it is, in general, erroneous to direct a verdict subject to the opinion of the court at General Term; but if the parties consent to such a disposition of the case, this is an abandonment or waiver of the exceptions, and they will be disregarded. *Byrnes v. City of Cohoes.* 204

2. Exceptions will not lie to the language of the judge in giving instructions to a jury, unless it is such as to convey a wrong impression, or to mislead as to the law of the case. *Ginna v. Second Ave. R. R. Co.* 596

— *Insufficiency of, to present question on appeal.*

*See Wooster v. Sage.*

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### EXECUTION.

1. A sheriff having several executions in his hands, issued upon judgments rendered in counties outside the judicial district in which he resides, may make a motion in his own county for directions as to the disposition of moneys collected by him, by levy and sale, under the executions. *Philips v. Wheeler.* 104

2. The property levied upon and sold by the sheriff belonged to a firm composed of defendants. Plaintiff, one of the execution creditors, obtained his judgment by default against defendants jointly, upon claims alleged to be due from their firm. The execution upon this judgment was the first one issued and delivered to the sheriff. Upon motion thereafter made by defendant W., the judgment was opened, and he was allowed to answer; he did so, denying the indebtedness, and upon trial obtained judgment, adjudging that the firm was not indebted to plaintiff. The other two defendants not having joined in the motion the original judgment was left standing as against them. *Held*, that by the change in the original judgment the execution was practically superseded; that if it retained any vitality it was only against the two defendants, for their debt, not the debt of the firm, and hence could take only their interest in the firm after payment of partnership debts; and that a subsequent execution, duly issued, upon a judgment against all the partners upon a firm debt, was entitled to a preference. *Id.*

### EXECUTORS AND ADMINISTRATORS.

1. The will of I. appointed three executors and directed that one of them should "receive a commission of six per cent upon all

moneys collected by him." *Held*, that this did not entitle the executor to the commission on the entire proceeds of the estate, or upon all sums received by the executor, but only on collections, giving the word its ordinary meaning. *Ireland v. Corcoran.* 843

2. As to whether an executor of an heir at law has the right to charge the estate of his testator, or expend the assets in his hands, for the payment of arrears of dower, where dower has not been assigned, *quære.* *Kyle v. Kyle.* 400

3. J. died in 1856, intestate, leaving a widow and five children. G. and D., two of the children, bought out the interests of the others in certain real estate of which J. died seized, and subsequently G. conveyed his interest to D. D. died in March, 1871, leaving a will of which G. was executor; he, in January, 1873, allowed to the widow of J., for the arrears of her dower, the value of the use of one-third of the real estate for six years prior to the testator's death, and gave his promissory note to her for the amount, deducting a sum paid by the testator during his lifetime. No dower had been admeasured or demanded, and no action to recover the same had been commenced. The amount of the note was allowed to the executor on settlement of his accounts by the surrogate. *Held*, error; that the allowance, if it could be sustained at all, must stand in the place of a judgment for damages; and, as the said statute (§ 20) only allows damages to be estimated for six years prior to a judgment therefor the allowance could only be for a period beginning six years prior to the time it was made, and ending at the testator's death, about four years and two months; also, that as, by said statute (§ 20), the widow is only entitled to recover damages of other persons than the heirs of her husband, from the time of demanding dower of them, and as, although the testator was an heir, yet he inherited but an undivided one-fifth, and derived title to four-fifths of the lands by

grant, for the value of the use of those four-fifths he was liable only from the time demand was made; and, no demand having been made, he was only liable for one-fifth of the use for the period above stated; and that, therefore, the executor had no authority to pay the widow her damages out of the assets of the estate, upon the basis adopted, still less to charge the estate by an executory contract to make such payment. *Id.*

4. In the deed from the three other children to G. and D., it was stated to be the intent to leave the right of dower in the lands to be adjusted and arranged by the grantees. *Held*, that the obligation thus imposed upon the grantees was joint, and G. had no right or power, as executor of the estate of D., to put the whole burden upon it to the relief of himself. *Id.*

5. A surrogate has jurisdiction to hear and adjudge upon a claim of an executor against the estate of his testator, whether the same be disputed or not. *Id.*

6. Where one having an interest in lands dies intestate after the sale thereof, his interest in the money realized from the sale is personal estate and goes to the administrators, not to the heirs at law. *Denham v. Cornell.* 556

7. Mrs. C., a married woman, owned certain lands subject to a mortgage, which was foreclosed. C., her husband, in fraud of her rights, bid off the premises, in his own name, on foreclosure sale and caused the same to be conveyed to H., who thereafter, at the request of C., conveyed to J. and M. in trust for C. C. contracted to sell the premises to S., but before conveyance Mrs. C. commenced this action, to restrain the conveyance, to have herself declared the beneficiary, and to compel a conveyance by J. and M. to herself. Upon motion for a preliminary injunction, an order was granted with the consent of plaintiff that the sale to S. should be completed, plaintiff also giving a deed, and

that the proceeds, after deducting certain liens, be paid into court to abide the event. This order was complied with. Mrs. C. thereafter died, her husband was appointed administrator, and her heirs at law were substituted as plaintiffs herein. *Held*, that C. was entitled to the balance of the proceeds, as administrator, and that the complaint was properly dismissed. *Id.*

— *What is sufficient prima facie evidence of domicile to authorize surrogate to grant letters of administration.*  
*Kennedy v. Ryall.* 380

## FENCES.

1. A railroad corporation which has parted with the possession and control of its road under a lease thereof to another corporation, containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon a highway, for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. *Ditchett v. S. D. and P. M. R. R. Co.* 425
2. The provision of the general railroad act, as amended in 1854 (chap. 282, Laws of 1854), imposing upon corporations formed under it the duty of erecting and maintaining fences on the sides of their roads, does not apply to fences for the protection of travelers upon a highway. *Id.*
3. As to whether the lessor of a railroad who has parted with possession can be held liable for the negligence of the lessee, under the statute in question, in a case where it does apply, *quære.* *Id.*

— *Built by railroad corporations under general railroad act are only for use of adjoining proprietors.*

*Spinner v. N. Y. C. and H. R. R. Co.* 156

## FORECLOSURE.

1. A general guardian, having in his hands moneys belonging to his ward, executed, individually, to

himself, as guardian, a bond and mortgage for the amount. He sold the mortgaged premises, subject to the mortgage, and subsequently brought this action to foreclose the mortgage, making himself, individually, and the owner of the equity of redemption parties defendant. A judgment of foreclosure and sale was perfected and the premises sold. On motion of the purchaser to be discharged from his purchase, *held*, that the parties were estopped by the judgment from questioning the validity of the mortgage; that, as between the guardian and ward, the court would regard it as a valid security against the guardian, and, so long as the money was realized, the ward had no ground of complaint; and that, therefore, so far as the mortgage was concerned, no difficulty existed as to conferring a good title. *Lyon v. Lyon.* 250

2. Certain judgment creditors of the owner of the equity of redemption were not made parties originally. After entry of judgment, upon written consent of the attorneys for said creditors, it was ordered that all the papers and proceedings be amended *nunc pro tunc*, by adding their names, and that they be bound by the proceedings. *Held*, that it was incumbent upon plaintiff to establish, unequivocally the authority of the attorneys to enter into the stipulation; that without such authority the judgment creditors were not bound; and, in the absence of proof thereof, the purchaser could not be compelled to take the title. *Id.*
3. Where, in a foreclosure suit, persons holding prior mortgages are not made parties, and no provision is made as to them in the judgment, the sale must be subject to such mortgages, and no portion of the proceeds of the sale can be applied in payment thereof. *Bache v. Doscher.* 429

#### FOREIGN CORPORATION.

1. Where process for the commencement of an action to a State court against a foreign insurance corpo-

ration, doing business in the State, has been served upon it in the manner prescribed by the insurance laws of the State, and the attorney who appears for it in the State court, at the time of entering an appearance, files a petition and moves for a removal of the cause, the defendant is bound by the acts of the attorney, and the petition and filing are its acts. *Shaft v. Phenix Ins. Co.* 544

2. A verification of the petition by the general and managing agent of the corporation in this State is sufficient; and averments in the verifying affidavits may be relied upon to show that the affiant has authority and means of knowledge. *Id.*

#### FORGERY.

1. Where one holding securities in pledge for a loan, in pursuance of a sale thereof made by the owner, delivers the same to the purchaser, receives the purchase-price, and after deducting the amount of the loan pays over the residue to the owner, this is not an affirmation by the pledgee of the genuineness of the securities, and, in the absence of fraud, an action cannot be sustained against him by the purchaser to recover back the purchase-price in case the securities prove to be forgeries. *Baker v. Arnot.* 448
2. In an action by a bank to recover the amount paid upon a raised check which had been certified by it, evidence that by the custom and common understanding of banks and merchants the word "certified" at the time of the certification, when used in the certification of checks, is construed to import an obligation on the part of the certifying bank to pay the amount stated in the check, notwithstanding the body of it was forged, is inadmissible. *Security Bk. v. Nat. Bk. of Republic.* 458
3. The plaintiff in such an action is not estopped from alleging the forgery by the fact that its teller at the time the check was presented for certification upon doubts

being expressed in regard to it by the person presenting it, stated that it was right in every particular. It is no part of a teller's duty to give an assurance as to the genuineness of a check, except in respect to the signature of a drawer; and beyond that the bank is not bound by his representations. *Id.*

#### FORMER ADJUDICATION.

— *When recovery by father, as administrator of child, of damages for negligently causing his death is a bar to an action by father individually.*  
*See McGovern v. N. Y. C. and H. R. R. Co.* 418

#### FORMER SUIT PENDING.

Prior to the making of a motion by a sheriff for directions as to the disposition of moneys collected on sale under several executions, had commenced an action against all the execution creditors, to determine their respective rights; some of the defendants answered, one demurred on the ground that the complaint did not state facts constituting a cause of action; the demurrer was sustained by the General Term. The action was pending at the time of making the motion. *Held*, that this was no bar to the motion; that it was at least a matter of discretion with the court, whether to grant relief on the motion during the pendency of the action. *Phillips v. Wheeler.* 104

#### FRAUD.

1. Where a vendee purchases property upon credit, knowing that he is insolvent, without disclosing that fact, and with intent not to pay for the property, fraud may be affirmed. *Wright v. Brown.* 1
2. The alleged ground for an order of arrest was fraud on the part of defendant, in contracting a debt for the purchase-price of 6,000 bushels of malt. The affidavit disclosed that defendant was a brewer; he gave his notes for the

malt at two, three and four months. Defendant was, at the time, indebted to his wife about \$75,000, and to others about \$55,000, a portion of which was in suit and liable at any time to go into judgment. His property was all personal, worth about \$20,000. The notes were given January eighth; on the fourteenth he borrowed of his brother \$9,000, giving a chattel mortgage on all his property, except the malt so purchased; on the fifteenth, he borrowed of another person \$4,500, on 5,000 bushels of the malt; on the eighteenth, he sold all his property, except the malt, to his wife, subject to the mortgage, the purchase-price being applied upon his indebtedness to her; and on February eighth he sold to her the malt, subject to the loan, the balance being applied in the same manner, and stopped business. Defendant's affidavit set forth facts tending to explain these circumstances, and alleged that he intended to continue in business and to pay for the malt when he purchased. No false representations were claimed to have been made by him, and no act or device was resorted to, to deceive plaintiff. Defendant was solicited to purchase, and urged to increase the amount beyond what he desired to purchase. *Held* (CHURCH, Ch. J., EARL and ANDREWS, JJ., dissenting), that upon the case made by plaintiff the inference was legitimate that defendant must have known when he purchased the malt, that he could not continue in business and pay for it, and hence was chargeable with an intent not to pay; that to what extent such case was impaired by the averments and explanations of defendant, depended partly upon the force to be given to the facts and inferences to be drawn therefrom, and the conclusion of the court below, adverse to defendant, was justifiable, and so conclusive here. *Id.*

3. Where a vendee has been induced to purchase property by means of fraud on the part of the vendor, mere want of diligence in dis-

covering the fraud, does not deprive the vendee of his right to rescind because thereof; he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, he has a perfect right to rescind. *Baker v. Lever*. 804

4. *It seems* that, as a general rule, a delay to rescind, after discovery of the fraud, does not operate as a waiver of the right, or as a confirmation of the fraudulent contract. *Id.*

5. One to whom a bond and mortgage, given to secure the price of property upon a fraudulent sale, is assigned without any pecuniary consideration being paid, but simply as a gift, does not occupy the position of a *bona fide* purchaser, so that the contract cannot be rescinded as to him. *Id.*

6. In the case of bankers, where greater confidence is asked and reposed, and where dishonest dealings may cause widespread disaster, a more rigid responsibility for good faith and honest dealing will be enforced than in the case of merchants and other traders. *Anonymous*. 598

7. A banker who is, to his own knowledge, hopelessly insolvent, cannot honestly continue his business and receive the money of his customers; and although having no actual intent to cheat and defraud a particular customer, he will be held to have intended the inevitable consequences of his act, *i. e.*, to cheat and defraud all persons whose money he receives, and whom he fails to pay before he is compelled to stop business. *Id.*

#### FRAUDS (STATUTE OF).

*See* STATUTE OF FRAUDS.

#### GOLD.

— *Contract for sale of, and performance of by agent of vendor.*

*See Fowler v. N. Y. G. Ex. Bk.* 188

#### GUARANTY.

1. Defendant executed a bond, "to be binding for one year only from date," conditioned that G. would pay within five days after maturity any paper discounted by plaintiff for him. In an action upon the bond, *held* (CHURCH, Ch. J., dissenting), that the limitation as to time related to the time when paper was discounted, not when it matured; and that under it defendant was liable for paper discounted within the year, but not maturing until after its expiration. *Davis v. Copeland*. 127

2. Defendant, in pursuance of an agreement with the B., H. and E. R. R. Co., guaranteed the payment of the interest coupons to the bonds of the latter corporation, a written guaranty thereof being indorsed upon each bond. Defendant subsequently became possessed of said bonds and transferred a portion of them, with the coupons and guaranties, to plaintiffs' testator for value. In an action upon the guaranties, *held* (ALLEN, J., dissenting), that even if the guaranties when made were *ultra vires*, and therefore not binding, defendant having transferred the bonds with the guaranties thereon uncanceled, it was to be presumed that they were intended to be, and were, taken by the purchaser as additional security and as part of the purchase; that they were to be treated as if written at the time of the transfer, and, so treating them, it was immaterial that the true consideration was not expressed therein. *Arnot v. Erie R. Co.* 315

3. Also, *held*, that it was immaterial that the above view was not taken by the trial court, or that it rests upon facts not specifically found; that, being based upon undisputed facts and just inferences therefrom, it was permissible in support of the judgment. *Id.*

— *When guarantor of payment of rent released by extension of time of payment and what is valid extension.*

*See Drucker v. Rapp*. 484

— *Construction of.*

*See Melcher v. Fisk* (Mem). 607

## GUARDIAN AND WARD.

A general guardian, having in his hands moneys belonging to his ward, executed, individually, to himself, as guardian, a bond and mortgage for the amount. He sold the mortgaged premises, subject to the mortgage, and subsequently brought this action to foreclose the mortgage, making himself, individually, and the owner of the equity of redemption parties defendant. A judgment of foreclosure and sale was perfected and the premises sold. On motion of the purchaser to be discharged from his purchase, *held*, that the parties were estopped by the judgment from questioning the validity of the mortgage; that, as between the guardian and ward, the court would regard it as a valid security against the guardian, and, as long as the money was realized, the ward had no ground of complaint; and that, therefore, so far as the mortgage was concerned, no difficulty existed as to conferring a good title. *Lyon v. Lyon*.

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## HEALTH.

—*Authority of health officer of port of New York over vessels subject to quarantine.*

*See Kennedy v. Ryall.*

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## HIGHWAYS.

1. Under the provisions of the Revised Statutes providing for the laying out of new roads, and the discontinuing of old ones (1 R. S., 502, *et seq.*), where a new road has been regularly laid out it cannot be discontinued as an old one before it has been opened and used, and when there has been no change of circumstances, removing the occasion for it and rendering it unnecessary. *People ex rel. v. Griswold*.

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2. The language of the statute (1 R. S., 517, § 81) authorizing the discontinuance of an old road where it has "become useless and unnecessary," implies a road for a time opened, but by a change of cir-

cumstances losing its usefulness; not a uselessness existing at the time it was laid out. *Id.*

3. As to the necessity of the road at that time, the finding of the jury of freeholders in proceedings to lay it out is conclusive unless appealed from. *Id.*

4. The owner of certain lands caused the same to be laid out into lots and streets, and a map thereof to be made and filed. In 1836 some of the lots were conveyed to B., the deed describing them as bounded on the sides of the streets adjoining; the deed conveyed also the grantee's interest in one-half of the streets lying immediately in front of the lots, "the same to be used, however, as public streets or roads forever." B. built a fence in front of some of the lots, inclosing eighteen feet in width of the adjoining street. By several mesne conveyances the lots in 1863 came to the plaintiff; all of the deeds contained the same provision as to the streets; the portion thereof not so inclosed was open for travel, although not formally opened or worked as a street. In 1871 the commissioners of highways of the town, by order, declared the street to be a public highway, and thereafter defendants, as commissioners, removed the fence. In an action of trespass, *held*, that the act of the original owner was a dedication of the land contained in the street as a highway; that there was no revocation of the dedication up to the time of its acceptance by the commissioners; that the erection and maintenance of the fence was not, to the extent of the land included therein, a revocation, as in the deeds the dedication was expressly recognized; and that by the acceptance the dedication became complete, the street a public highway, and defendants were justified in removing the fence. *Bridges v. Wyckoff*.

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5. Also, *held*, that the provision of the statute (1 R. S., 520, § 99, amended by chap. 311, Laws of 1861) declaring that a highway shall cease to be such which is not opened and worked within six



years did not apply, as the land did not become a highway until accepted as such in 1871 *Id.*

6. Also, *held*, that plaintiff could not claim the land by adverse possession, as he took under a conveyance recognizing the public right, and so it was not held adversely. *Id.*

7. The provision of the general railroad act, as amended in 1854 (chap. 282, Laws of 1854), imposing upon corporations formed under it the duty of erecting and maintaining fences on the sides of their roads, does not apply to fences for the protection of travelers upon a highway. *Ditchett v. S. D. and P. M. R. R. Co.* 425

#### INDICTMENT.

1. In an indictment for mayhem, premeditated design must be averred; but it is not necessary to state the manner in which the premeditated design was evinced. The circumstances establishing premeditation are matters of evidence, to be proved on the trial. *Tully v. People.* 15
2. The distinction between the statute of this State and the English statute defining the offence pointed out. *Id.*
3. In an indictment upon a statute it is unnecessary that the words of the statute should be precisely followed, but words of equivalent import or more extensive signification, and which necessarily include the words used, may be substituted. *Id.*
4. An indictment for mayhem charged that the accused did "cut, bite, slit and destroy" the thumb of the prosecutor. The offence proved was that the thumb was disabled. The indictment was claimed to be defective, in that it did not allege that the thumb was "disabled" in accordance with the statutory definition of the offence, (2 R. S., 665, § 27.) *Held*, that the word "destroy" was a more compre-

hensive word than "disable," and includes what is signified by it, and that therefore the indictment was not defective by reason of the substitution. *Id.*

#### INFANTS.

1. Where proceedings are instituted, under the statute, for the sale of the real estate of an infant (2 R. S., 194, § 170, *et seq.*), from the time of the application, the infant is to be considered as a ward of the court so far as relates to the property affected, its proceeds or income. *In re Price.* 231
2. The special guardian is an officer of the court, and so long as the purchase-money remains in his hands, and until the infant arrives at majority and receives it, the court has control over it and over the proceedings. It may correct any irregularities or error on the part of its officers in the proceedings, so as to protect a party likely innocently to suffer thereby. *Id.*
3. In proceedings under said statute the petition stated, and the referee to whom it was referred to ascertain the facts reported, that the infant owned an undivided one-half of the premises, and this was the belief of all parties concerned in the proceedings during their progress. A sale was ordered and made, of the interest of the infant, and an order granted approving of the conveyance to the purchaser. Thereafter, in an action of ejectment against the grantee of the purchaser, it was, in effect, determined that the infant only owned an undivided one-third. The purchaser, having made compensation to his grantee for the deficiency, moved, in the proceedings, that the special guardian of the infant be required to refund one-third of the purchase-money. *Held*, that the motion was properly granted. *Id.*

#### INJUNCTION.

1. The court will not sustain an action to restrain a prosecution to

- recover a penalty imposed by statute, on the ground of the invalidity of the statute, at least until its invalidity has been determined in a previous action. *Wallack v. Society, etc.* 23
2. Nor can an action to restrain such prosecution be sustained as a bill of peace, where the plaintiff brings it in his own behalf, and not also in behalf of others claiming the same right. *Id.*
3. So, also a court of equity will not issue an injunction restraining defendant from applying to such court for equitable relief in the same matter; especially where such relief is expressly authorized by a statute, the validity of which has not been judicially questioned. *Id.*
4. Accordingly *held*, that even assuming the unconstitutionality of the act of 1872, "regulating places of amusement in the city of New York," chap. 888, Laws of 1872), plaintiff, a theatrical manager, could not maintain an action to restrain defendant, "The Society for the Reformation of Juvenile Delinquents," etc., from suing for the penalty imposed by said act upon any person exhibiting a dramatic exhibition without a license, or from enjoining such an exhibition. *Id.*
5. Plaintiffs' testator, M., was a stockholder in a Vermont mining corporation. Its directors imposed an assessment upon its stock and advertised the stock of M. for sale for non-payment thereof. Prior to the sale M. tendered to the president of the corporation, at its office, during business hours, his check for the amount of the assessment. The president refused to accept, but made no objection as to form or amount. The stock was sold and bought in by the president. M. repeatedly thereafter offered to the corporation and to its president the amount of the assessment and all charges and expenses in making the sale. In an action brought to set aside the sale and to restrain a transfer of the stock to the purchaser, *held*, that in the absence of evidence of want of authority in the president the tender must be assumed to have been properly made to him; that the question of want of authority not having been raised upon the trial, could not be raised upon appeal; that no objections as to the form or amount of the tender having been made at the time, they were waived and the tender must be held sufficient; that a sufficient tender having been made, the sale was without authority and void, and that plaintiff was entitled to the equitable relief claimed. *Mitchell v. Vt. C. M. Co.* 230
6. Under the provisions of said charter the common council of the city, by ordinance, ordered one tier of lots on each side of Oak street, within certain limits, to be assessed for a local improvement. The assessors omitted certain lots belonging to the State within the prescribed limits, and imposed the whole assessment upon the owners of other lots. In an action, by said owners, to restrain the collection of the assessment, *held*, that the assessment was illegal and void, and the action was maintainable; and that the assessors, in failing to comply with the ordinance and with the requirements of the statute, did not act judicially, and that their decision could be reviewed collaterally. *Hassan v. City of Rochester.* 529
7. In the absence of proof it will not be assumed in such case that plaintiff's taxes will only be increased to an amount so trifling that the court will not interfere; the presumption is the other way. *Id.*
8. Plaintiffs were not bound to offer to pay their proportion of the assessment. *Id.*
9. Nor was it necessary to prove on the trial that the property omitted was benefited by the improvement. The common council in passing the ordinance prescribing the territory to be assessed, adjudged that all parts thereof were benefited, and bound the assessors to assume that the lands omitted derived some benefit; and on that as-

sumption it should have been assessed. *Id.*

10. A confirmation of the assessment by the common council, after notice, did not preclude plaintiffs from the equitable relief sought. The provisions of the charter relating to the confirmation of assessments (§§ 197-199) vest no authority in the common council to confirm an assessment made in violation of an ordinance. *Id.*

11. This action was brought by plaintiffs, as judgment creditors of D., to have a prior judgment, in favor of defendants against D., adjudged paid and satisfied, and to restrain them from receiving the avails of an execution sale of the debtor's property. A preliminary injunction was obtained upon the ordinary undertaking, and, upon stipulation of the parties, it was ordered that the question of defendants' damages, if any, sustained by reason of the injunction, be heard and determined, jointly with the issues, by the referee. No evidence of damage was given on the trial; no findings of fact were made by the referee in regard thereto, nor were any requests made to find. Upon appeal from a judgment in favor of defendants, but allowing no damages, *held*, that the question of damages was not presented by the appeal; but that if presented, in the absence of proof of damages, the referee was right in not allowing any thing therefor; that it was not imperative upon the referee to make an allowance for counsel fees, without proof of a payment, or that a liability had been incurred therefor. *Parker v. Nevins*. 550

12. Also *held*, that the provisions of the Revised Statutes (2 R. S., 189, § 141, *et seq.*), requiring a deposit to be made of the amount of a judgment, in case of an injunction staying proceedings thereon, did not make the amount of the deposit required the standard for measuring damages in this action, as said provisions applied only to the parties to the action wherein the proceedings were restrained,

or their privies; and that, even if said provisions were applicable, the deposit was dispensed with by an acceptance of the undertaking, and defendants were left to prove what their damages actually were. *Id.*

13. Mrs. C., a married woman, owned certain lands subject to a mortgage, which was foreclosed. C., her husband, in fraud of her rights, bid off the premises, in his own name, on foreclosure sale and caused the same to be conveyed to H., who thereafter, at the request of C., conveyed to J. and M. in trust for C. C. contracted to sell the premises to S., but before conveyance Mrs. C. commenced this action to restrain the conveyance, to have herself declared the beneficiary, and to compel a conveyance by J. and M., to herself. Upon motion for a preliminary injunction an order was granted, with the consent of the plaintiff, that the sale to S. should be completed, plaintiff also giving a deed, and that the proceeds, after deducting certain liens, be paid into court to abide the event. This order was complied with. Mrs. C. thereafter died, her husband was appointed administrator, and her heirs at law were substituted as plaintiffs here. *Held*, that C. was entitled to the balance of the proceeds, as administrator, and that the complaint was properly dismissed. *Denham v. Cornell*. 556

#### INSURANCE (FIRE).

1. A policy of insurance issued by defendant upon plaintiff's dwelling-house contained a provision that if the dwelling-house "became vacated by the removal of the owner or occupant," the policy would be void, etc. In an action upon the policy, plaintiff's evidence tended to show that the occupant and his wife absented themselves from the house for a considerable period, but for a temporary and special purpose, he retaining it as his residence, and in tending to return to it, leaving his furniture and family clothing therein, his wife taking care of it,

going to it every week to cleanse it, and, from time to time, for other purposes. *Held*, that the provision referred to a permanent removal, an entire abandonment of the house as a place of residence; and that a refusal of the court to submit to the jury the question whether the house had been vacated by the removal of the occupant was error. *Cummins v. Ag. Ins. Co.* 260

2. Also *held*, that a statement in the proof of loss that the premises were vacant did not preclude plaintiff from showing the circumstances under which the house had been vacated. *Id.*

3. A policy of fire insurance contained a provision that in case of loss the insured should "forthwith give notice" thereof to the secretary of the company, and within thirty days thereafter deliver to the secretary a particular account thereof. Some two months after it was issued, the insured delivered the policy to an agent of the company for the purpose of having its consent to an alteration in the property insured indorsed thereon. The agent forwarded it to the company, which retained and canceled it; of this the insured had no notice. The property was destroyed January twentieth, the local agents of the company were notified in a day or two, and the general agent shortly after. The insured had no knowledge that any further notice was necessary. On February fifteenth, they called at the office of the company and procured a blank policy, thus learning for the first time what notice was required; this they immediately gave, and furnished proofs of loss February nineteenth. In an action upon the policy, *held*, that the word "forthwith" did not mean immediately or instantaneously, but within a reasonable time, or with reasonable diligence, dependent upon the circumstances of the case; that, under the circumstances, the notice given was within reasonable time, and so "forthwith" within the meaning of the policy; and that the proofs of loss

were furnished within the prescribed time. *Bennett v. Lycoming Co. Mut. Ins. Co.* 274

4. The trial court held, as matter of law, that notice was not given within a reasonable time, but left it to the jury to find whether there had been a waiver of notice. The only fact upon which a waiver could be predicated was, that when notice of loss was given to the secretary, he claimed the company had no risk upon the property, and did not raise the question that the notice was too late. *Held*, error; that the facts did not show a waiver; but that, as the notice was given in accordance with the requirements of the policy, defendant was not harmed by the rulings of the court; and so the error was not ground for reversal. *Id.*

5. Where the complaint in an action upon a policy of fire insurance, sets forth facts showing that the parties were mistaken as to the effect of the language used, the averments are sufficient to authorize a reformation of the contract, although there is no direct allegation of a mistake of fact. *Maher v. Hib. Ins. Co.* 288

6. Although a party insured accepts a policy with knowledge of the language used in describing the property insured, if, at the time, he points out a mistake therein, but is prevented from having the same corrected, or is thrown off his guard and dissuaded therefrom, by the acts or declarations of the insurer, he may show the mistake in an action on the policy; and the insurer is estopped from setting up the letter of the contract in bar of the action, and from claiming that the situation of the property does not agree therewith. *Id.*

7. Where the parties to a contract, through a misconception as to the meaning and effect of terms when used in such a contract, use terms which, failing to express their intention, do express a meaning different from that intended, proof of the facts will make a case for

a reformation of the contract; and this, although they knew what words were employed and their ordinary meaning. *Id.*

8. A policy of fire insurance upon plaintiff's building, described it as "occupied as a dwelling." A portion of the lower story was occupied as a grocery, and the residue of the house as a dwelling. In an action upon the policy it was alleged, and evidence was given and received under objection on the trial, showing that plaintiff and the local agent of the insurer, who filled out and issued the policy, knew at the time how the house was occupied; that they both intended to insure it, as it was actually occupied, and both thought the terms used in the description in the policy would properly designate the occupation; that plaintiff, doubting whether the intention had been well carried out, called the attention of the agent to the erroneous description, and was assured by him that it made no difference, that the words used were apt and ample to express their meaning and intention; also, that the secretary and general agent of the insurer, with knowledge of the description in the policy, inspected in person the property insured and pronounced the risk a good one. No express allegation of a mistake was contained in the complaint. *Held*, that the evidence was properly received and was sufficient to authorize a reformation of the contract, which was proper under the pleadings. *Id.*

9. Also, *held*, that a reformation of the policy did not render nugatory, or affect the proofs of loss furnished. *Id.*

10. The policy contained a condition that any fraud or "false swearing" would forfeit all claims under it. Plaintiff, in his proofs of loss, stated under oath that the building was occupied as a dwelling-house, and for no other purpose. *Held*, that the term "false swearing" meant a verified false assertion fitted and likely to, or which does deceive; and that as

defendant, through its agents and secretary knew the facts, and as the words used, when charged with the meaning given to them by the parties, were not untrue, as between them, there was no breach of the condition. *Id.*

#### INSURANCE (LIFE).

1. Where, in a policy of life insurance, it is stated that the insurance is made in consideration of the representations in the application, but the application is not made a part of the policy, or, in any other manner, referred to therein, it is not error to admit the policy in evidence, on the part of the plaintiff, in an action brought upon it, without production of the application. If any question is raised by defendant thereon, it more properly belongs to it to introduce the application in evidence. *Edgington v. Mut. L. Ins. Co.* 185
2. An error in admitting a policy in evidence without the application, is cured by the introduction of the application in evidence by the defendant. *Id.*
3. Declarations and admissions of the assured as to his condition of health, made at a time prior to and remote from the application, and not in connection with some act or fact showing his state of health, are not competent, in an action by an assignee upon the policy, for the purpose of disputing representations in the application. *Id.*
4. The provision of the Revised Statutes (2 R. S., 406, § 73) prohibiting a physician from disclosing any information received by him necessary to enable him to prescribe for a patient includes not only information from statements of the patient, but such knowledge as the physician may acquire from the patient, from statements of others present at the time, or from his own observation of the patient's symptoms and appearance. *Id.*

5. It will be presumed, from the relationship of the parties, that information so imparted was given or obtained for the purpose of enabling the physician to prescribe for the patient, and so, that it was material. *Id.*
6. Accordingly, *held*, in an action upon a policy of life insurance, that an offer, upon the part of defendant, to prove by a physician, who had been consulted professionally by the assured, that prior to the application he was afflicted with certain diseases for which the witness treated him, was properly excluded, although the testimony was expressly limited to what the witness knew, independent of any information given or statements made by the assured. *Id.*
7. The right of objecting to the disclosure of such privileged communications is not limited to the patient and his personal representation, but an assignee may exercise it, and his right is not affected by the decease of the patient. *Id.*
8. The statutory prohibition above referred to is not repealed by the section of the Code (§ 390) authorizing the examination of an adverse party as a witness. *Id.*
9. An application for insurance contained these questions. "How long since you were attended by any physician? For what diseases? Give name and residence of your usual medical attendant?" The assured answered: "Have none; only consulted Dr. C. H. Carpenter now and then for slight ailments and taken his prescriptions." In an action upon the policy it appeared that several other physicians had treated and prescribed for him. *Held*, that the question whether the assured could be charged with an omission to give such information as the questions were intended to elicit, was one of fact for the jury, and that a refusal to allow defendant to go to the jury was error. *Id.*
10. Defendant insured the life of B., the policy being subject to a forfeiture in case of non-payment of premiums when due. Prior to the time when a semi-annual payment of premium fell due, defendant's president signed an indorsement upon a card giving notice of the day when payment was due, as follows: "Payment extended until October 10, 1874." B. died September 19, 1874. In an action upon the policy, *held*, that the extension estopped the defendant from claiming a forfeiture and continued the policy in full force, subject only to a forfeiture by non-payment at the time to which performance was deferred; that there was no condition expressed or implied in the extension, that the insured should be living at the time stated therein, or varying the original contract as a continuous contract of insurance. *Homer v. Guardian Mut. L. Ins. Co.* 478
11. Also, *held*, that the assured by asking and accepting an extension of time and a waiver of the forfeiture by clear implication agreed to continue the risk and to pay the premium at the day fixed, for which implied promise the extension was a good consideration; that the memorandum was sufficient to enable the court to give effect to the intent of the parties; and that therefore the extension was valid, as an agreement based upon mutual promises. *Id.*
12. F. having applied for an insurance upon his life, a physician, who was medical examiner of the defendant, and who was also the medical attendant of the applicant, called upon him to make the medical examination and to take and receive his application. The physician filled up the entire application, asking the questions and inserting the answers. F. gave full and accurate information in response to the questions before the answers were written, but the answers, as written by and under the advice of the physician were some of them untrue. A policy was issued by which the statements in the application were made warranties. In an action upon the policy, *held* (CHURCH,

- Ch. J., and MILLER, J., dissenting), that the physician was not the agent of the company for the purpose of soliciting or filling out applications, nor was such authority incident to, or within, the apparent scope of his agency as medical examiner; that it therefore was not bond by his acts; and that by the breach of warranty the policy was forfeited. *Flynn v. Eq. L. As. Soc.* 500
13. To avoid a policy of life insurance upon the ground of misrepresentation, it must, in the absence of fraud, be in respect to some circumstance or fact material to the contract, and by which the insurer is induced to undertake the risk. *Bartean v. Phoenix M. L. Ins. Co.* 595
14. A warranty, however, must be literally true, whether the fact warranted be material or not. *Id.*
15. In case of a warranty, therefore, the question, how far the fact was or was not material, is not to be considered. *Id.*
16. Knowledge on the part of the agent of a life insurance company of the falsity of a warranty will not relieve the assured from a forfeiture of the policy. *Id.*
- *Service of process on foreign insurance corporation, and sufficiency of petition filed by attorney of, to remove cause.*  
*See Shaft v. P. M. L. Ins. Co.* 544
- arising from causes other than fire. *People v. McCann.* 506
2. One acting, therefore, within this State as the agent in receiving and procuring applications for insurance for such a company organized under the laws of another State, which company has not filed with the superintendent of the insurance department a certificate showing it to be possessed of the capital prescribed by said act (§ 14), is liable for the penalty imposed thereby. (§ 18.) *Id.*
3. A recovery may also be had against such agent for the penalty imposed by the act of 1861 (chap. 334, Laws of 1861) upon the agent of a foreign insurance company, in case of the failure of the company to file the annual statement required by that act. *Id.*
4. The only effect of the act of 1873 (chap. 617, Laws of 1873), in relation to plate-glass insurance companies, was to reduce the amount of deposit required of such companies. It did not abrogate the penalties imposed by the said act of 1853. *Id.*
5. To maintain an action to recover the penalty imposed by said act of 1853, it is not necessary to set forth the statute in the complaint; it is sufficient to state that the acts complained of were in violation of the insurance statutes of the State. *Id.*

## INTEREST.

### INSURANCE (PLATE-GLASS).

1. The provision of the insurance law of 1853 (chap. 463, Laws of 1853), as amended in 1863 (chap. 800, Laws of 1863), and in 1865 (chap. 328, Laws of 1865), which provides for the incorporation of companies to make insurance, among other things, "against loss, damage or liability arising from any unknown or contingent event whatever, which may be the subject of legal insurance," except fire, marine and life insurance, embraces insurance against accidents or damage to plate-glass
1. In an action to recover a balance alleged to be due for services upon a *quantum meruit*, it appeared that when plaintiff left defendant's employ he demanded his pay, and that the action was commenced in about a month thereafter; the referee allowed interest upon the balance found due from the time of the demand. *Held*, that plaintiff was, at least, entitled to interest from the commencement of the action, and the error, if any, in allowing it from the time of the demand, was not sufficiently substantial to call for

a correction here; particularly in the absence of a specific objection pointing out the deduction required. *Mercer v. Voss.* 56

2. In an action against the city of New York for an unpaid salary, interest is only recoverable from the time of demand. *Taylor v. Mayor, etc.* 88

3. Compound interest can only be recovered upon some new and independent agreement made after simple interest has accrued, and upon sufficient consideration, or, in mercantile transactions, upon a contract implied from the course of dealing or from custom. *Young v. Hill.* 162

4. Where interest has already accrued, the parties may lawfully agree to turn such interest into principal so as to carry interest *in futuro*, and the forbearance will constitute a consideration; but a promise to pay interest upon interest, which is to operate retrospectively, and is supported by no consideration save a moral one resulting from the fact that the interest is in arrear and unpaid, is not valid (CHURCH, Ch., J., FOLGER and EARL, JJ., dissenting). *Id.*

5. *It seems* that it is not necessary to the validity of a promise to pay compound interest that it be in writing. *Id.*

6. F., defendant's intestate, executed to P., plaintiff's testator, his bond, conditioned to pay \$6,736, in installments, with annual interest at six per cent. F. was the agent of P., and had in his hands this bond, with the other securities of his principal. F. annually computed the amount due upon the bond, compounding the interest, attaching each yearly computation to the bond, and entering it in a bond book kept by him as such agent. At the termination of F.'s agency, an account was stated between him and his principal, one item of which was the amount found due upon the bond, with interest so compounded; reckoning simple interest

only, the payments made by F. upon the bond were more than sufficient to pay it in full. In an action upon the account stated, *held* (CHURCH, Ch. J., FOLGER and EARL, JJ., dissenting), that there was no promise or agreement to pay compound interest, as the statement of the account was but an admission of the correctness of the balance with interest compounded; that if a promise could be construed or implied from the account stated, there was no consideration to support the same; and that the claim could not be brought within the principle upon which compound interest is allowed upon the periodical statement of accounts between merchants. *Id.*

— *When not allowable as damages.*  
*See Schuyler v. Hayward.* 258

# JOINT DEBTORS.

— *After death of one his personal representatives cannot be joined as defendants with survivor without averments of inability to collect of survivor.*  
*See Haruck v. Craighead.* 483

# JUDGMENT.

1. Where a judgment has been affirmed by the General Term, with costs, an entry of judgment without including costs is regular; the respondent may waive costs, and, by entering up judgment upon the order of affirmance without inserting them, he does waive them. *Whitney v. Townsend.* 40

2. The docketing of a judgment is only necessary to create a lien upon lands. *Id.*

3. Under the statutory requirement, that judgments shall be entered in a "judgment book," separate books are not required for the entry of judgments in legal and equitable actions. *Id.*

4. Where separate books are kept, a departure from the usual prac-



tice of the office by an entry of a judgment in one book which properly belongs in the other, may be disregarded, or the error corrected by the courts in its discretion; and its action is not reviewable here. *Id.*

5. So an order denying a motion to set aside a judgment, because of failure to file a proper judgment roll, is not reviewable here; if what was done amounts to a legal nullity, no substantial rights of defendant are impaired by the denial; if the roll is not in due form, or the filing, for any reason, is irregular, the granting or refusing the application is discretionary. *Id.*

6. In an action against three copartners upon a partnership obligation the summons was served upon two, and judgment was perfected by default against the two served. An execution was issued against the joint property of all the defendants and returned unsatisfied. *Held*, that plaintiff had sufficiently exhausted its remedy at law to entitle it to proceed in equity to reach joint property. (Code, § 294.) *Produce B'k v. Morton.* 199

7. Also, *held*, that an order correcting the defect in the entry of judgment *nunc pro tunc*, made after the commencement of the equitable action, was valid and effectual. *Id.*

8. A judgment in an action to set aside an assignment for the benefit of creditors, adjudging the assignment to be null and void, directing the assignor to account before a referee, and that a receiver be appointed to take charge of the assigned property, to pay out of it plaintiff's judgment, and to hold the residue subject to the order of the court, is a final judgment, reviewable by appeal. It is not a proper case for a motion for a new trial under section 268 of the Code. *Id.*

9. Where a judgment against the accused in a criminal action is re-

versed by the General Term upon writ of error, solely upon the ground of an irregularity therein, and in the sentence; and the proceedings are remitted to the trial court to pronounce a proper sentence and judgment, error will not lie to this court at the suit of the plaintiff in error below. He must await a final judgment, and for errors other than that upon which he succeeded he must seek his remedy, if any, by another writ of error. *Pratt v. People.* 606

— *Lien of.*

*See Ackerman v. Gorton.* 63

— *Entry upon docket of "secured on appeal," postpones lien of, as against mortgage taken in good faith. See Union Dime Savings Institution v. Duryea.* 84

## JUDICIAL SALES.

1. In proceedings under the statute for the sale of the real estate of an infant the petition stated, and the referee to whom it was referred to ascertain the facts reported, that the infant owned an undivided one-half of the premises, and this was the belief of all parties concerned in the proceedings during their progress. A sale was ordered and made, of the interest of the infant, and an order granted approving of the conveyance to the purchaser. Thereafter, in an action of ejectment against the grantee of the purchaser, it was, in effect, determined that the infant only owned an undivided one-third. The purchaser, having made compensation to his grantee for the deficiency, moved, in the proceedings, that the special guardian of the infant be required to refund one-third of the purchase-money. *Held*, that the motion was properly granted. *In re Price.* 281

2. Where, in a foreclosure suit, persons holding prior mortgages are not made parties, and no provision is made as to them in the judgment, the sale must be subject to such mortgages, and no portion of the proceeds of the sale can be applied in payment thereof. *Bache v. Doscher.* 429

JURY.

*See* COMMISSIONER OF JURORS (N. Y.).

LACHES.

1. Where a vendee has been induced to purchase property by means of fraud on the part of the vendor, mere want of diligence in discovering the fraud does not deprive the vendee of his right to rescind because thereof; he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, he has a perfect right to rescind. *Baker v. Lever.* 804

2. *It seems* that, as a general rule, a delay to rescind, after discovery of the fraud, does not operate as a waiver of the right, or as a confirmation of the fraudulent contract. *Id.*

— *When delay in rescinding contract not unreasonable as matter of law.*

*See* Wooster v. Sage.

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LARCENY.

1. Where two persons conspire together, fraudulently, to get possession of the money of another, with a felonious intent to convert it to their own use, and, by means of a fraudulent contrivance or device, succeed in inducing the owner to deliver the temporary possession thereof for a specific purpose, and then, without his consent and against his wishes, convert the same to their own use, they are guilty of larceny. *Loomis v. People.* 322

2. Upon the trial of an indictment for larceny, it appeared that Lewis, one of the prisoners, made the acquaintance of Olason, the prosecutor, and, under the pretense that he had a check for \$500 he desired to get cashed at a bank, invited Olason to go with him; he led him into a saloon, where was the prisoner, Loomis, whom the evidence showed to be a confederate of

Lewis. Lewis proposed to Loomis to throw dice; they did so for five dollars, and Loomis lost; they then proposed to throw for \$100. Lewis asked Olason to lend him ninety dollars, saying, "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and will go up to the bank and get the check cashed and you can have the money." Olason let him have the ninety dollars; the dice were thrown and Lewis lost. Olason insisted on the return of his money; the purported check was then put up against \$100, and Lewis again lost; Loomis and Lewis thereupon went away. The court charged the jury, in substance, that if satisfied beyond a reasonable doubt that the two prisoners conspired fraudulently and feloniously, to obtain the complainant's money, and to convert it absolutely without his consent and against his will, they could convict of larceny. *Held*, no error; and that the evidence was sufficient to sustain a conviction. *Id.*

LEASE.

A railroad corporation which has parted with the possession and control of its road under a lease thereof, to another corporation containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon the highway, for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. *Ditchett v. S. D. and P. M. R. R. Co.* 426

— *Guaranty of payment of rent, when discharged by extension of time for payment.*

*See* Ducker v. Rapp.

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LEGACY.

*See* WILLS.

LIENS.

1. Under the provision of the Code (§ 282), authorizing the court

where, upon appeal from a judgment, an undertaking requisite to stay execution has been given, to exempt by order from the lien of such judgment real estate upon which it is a lien, and to direct an entry on the docket of judgment that it is "secured on appeal," and declaring that thereupon such judgment shall cease, during the pendency of the appeal, to be a lien upon the property so exempted "as against purchasers and mortgagees in good faith," one who has, during the pendency of the appeal, taken a mortgage "in good faith" upon property so exempted, in payment of an antecedent debt, is protected, and his mortgage has a preference over the judgment. *Union Dime Sogs. Inst. v. Duryea.* 84

2. It is not necessary for him to show that he parted with value on the faith of the mortgage. *Id.*

— *Of judgment.*

*See Ackerman v. Gorton.* 68

— *Of assessments under act, chapter 86, Revised Laws of 1813, not created until confirmation of report of commissioners of estimate and assessment.*  
*See Foster v. Mayor, etc.* 78

*See MECHANIC'S LIENS.  
 MORTGAGE.*

### MANDAMUS.

1. The granting of a writ of *mandamus* is proper to compel a board of supervisors to audit the accounts of the county sheriff, as jailer, for receiving, discharging and boarding prisoners committed by the officers of a city for misdemeanors and violations of city ordinances. *People ex rel. v. Suprs. Col. Co.* 330
2. Under the provisions of the Code (§ 482) authorizing actions in the nature of a *quo warranto* to try the title to office, no positive duty is imposed upon the attorney-general to bring an action upon request of a party claiming office from which he is expelled, but it is a matter within his discretion, and the courts cannot sit in judgment upon

his exercise thereof or coerce his action. *People ex rel. v. Fairchild.* 334

3. Accordingly, *held*, that a *mandamus* would not lie at the instance of a claimant to an office to compel the attorney-general to commence such an action. *Id.*

### MANUFACTURING CORPORATION.

1. In an action to recover an unpaid balance of a subscription to the capital stock of a manufacturing corporation, where it appears that defendant subscribed for the stock, acted as a trustee of the corporation, took part in its management and contracted with it as a corporation, he cannot dispute the validity of the incorporation. *Phoenix W. Co. v. Badger.* 294
2. A subscription to the articles of incorporation, with a statement of the number of shares opposite the name, is a sufficient and binding subscription for the stock, and takes effect upon the filing of the certificate. *Id.*
3. An action may be brought upon the original subscription; it is not necessary to aver calls, at least after the lapse of two years from the time of incorporation. *Id.*
4. Such an action brought by the corporation, may be continued by a receiver subsequently appointed in the name of the original party. *Id.*
5. An abandonment of its business by the corporation, either before or after the commencement of the action, is no defence where it appears that the incorporation is indebted to more than the amount of the subscription, as the action is prosecuted for the benefit of creditors. *Id.*
6. An objection that other subscribers who have not paid should have been made parties, is not available on appeal where the objection was not raised by answer, and where there were no findings or requests to find in reference

thereto, or exceptions raising the point. *Id.*

7. The refusal of a referee in such an action to allow an amendment of the answer setting up that the signature of another apparent subscriber was not genuine, and that defendant was misled thereby, is not the proper subject of exception; if the referee has power to allow the amendment it is matter of discretion. *Id.*

8. Subsequent to defendant's subscription an arrangement was made, with the approval of the corporation, that defendant should transfer a portion of his stock to E., the latter delivering to the corporation his notes therefor, indorsed by defendant, the stock to be transferred when the notes were paid. Notes were so given, which were renewed from time to time. One of the renewals was transferred by the corporation to P. as collateral security. P. returned it to the corporation, and with his consent it was produced and offered for cancellation on the trial. *Held*, that defendant was not entitled to have the amount thereof deducted from the amount due on his subscription. *Id.*

### MASTER AND SERVANT.

Defendant's firm employed plaintiff, as clerk, for a specified period, agreeing to pay him for his services a certain proportion of the profits of the business, he being entitled to receive on account of his salary thirty-five dollars per week. Defendant, without good cause, discharged plaintiff before the expiration of the time fixed. In an action to recover damages for breach of the contract, no evidence was given showing profits. The referee allowed plaintiff thirty-five dollars per week for the unexpired term. *Held*, no error; that by defendant's action plaintiff was prevented from assisting, by his services, in making profits, or from proving what they would have been, and, in the absence of evidence that profits could not have been earned had he been al-

lowed to continue in defendant's employment, they were not in position to claim that no profits would have accrued; that, therefore, as the damages could not be based upon proof of profits, and as the contract fixed the minimum estimate of the value of plaintiff's services, this furnished a criterion from which the damages could fairly be estimated. *Gifford v. Waters.* 80

— *Liability of railroad corporation for injury to employe.*

*See Booth v. B. and A. R. R. Co.* (Mem.) 593

### MAYHEM.

1. In an indictment for mayhem, premeditated design must be averred; but it is not necessary to state the manner in which the premeditated design was evinced. The circumstances establishing premeditation are matters of evidence to be proved on the trial. *Tully v. People.* 15

2. The distinction between the statute of this State and the English statute defining the offence pointed out. *Id.*

3. In an indictment upon a statute it is unnecessary that the words of the statute should be precisely followed, but words of equivalent import or more extensive signification, and which necessarily include the words used, may be substituted. *Id.*

4. An indictment for mayhem charged that the accused did "cut, bite, slit and destroy" the thumb of the prosecutor. The offence proved was that the thumb was disabled. The indictment was claimed to be defective, in that it did not allege that the thumb was "disabled" in accordance with the statutory definition of the offence. (2 R. S., 685, § 27.) *Held*, that the word "destroy" was a more comprehensive word than "disable," and includes what is signified by it; and that therefore the indictment was not defective by reason of the substitution. *Id.*

## MECHANICS' LIENS.

1. Whatsoever is comprehended in the terms "wharves, piers, bulkheads and bridges, and other structures connected therewith," as used in the act of 1872 in relation to mechanics' liens (chap. 669, Laws of 1872) is exclusively provided for by that law; and to perfect a lien, whether for labor or materials, its requirement in regard to the filing thereof must be followed. *Collins v. Drew*. 149
2. The term "other structures connected therewith" includes all structures connected with a wharf, pier, etc., and necessary for its proper use. *Id.*
3. Accordingly, *held*, that "sheds" erected upon piers in the city of New York, of a steam navigation company, for offices and other purposes of the company were included in that term, and that a lien for materials furnished for, and used in, the erection of such "sheds," not filed within thirty days from the time when the materials were delivered was invalid, although filed within the time prescribed by the general lien law of that city. *Id.*
4. One C. contracted to erect a building on defendant's premises, eighty per cent of the contract-price to be paid during the progress of the work, the residue when it was completed. After the eighty per cent was paid, a mechanic's lien was filed for materials furnished to C. In an action to foreclose the same, defendant offered to prove that the contractor became unable to complete the building, and, after the filing of the lien, defendant, in order to complete it, was forced to, and did, purchase materials and pay for labor to an amount exceeding the residue unpaid. The evidence was excluded. *Held*, error; that expenditures made under such circumstances could not be treated as payments to the contractor upon his contract, which would, under the mechanic's lien law of 1854 (chap. 412, Laws of 1854, as amended by chapter 558 of Laws of 1869) render the owner liable to a material-man, even although there was no formal abandonment of the contract. *Redbourn v. S. L. G. & W. Co.* 215
5. The provision of the mechanic's lien law for the city of New York of 1863 (§ 14, chap. 500, Laws of 1863), declaring that for the purposes of the act one who has sold lands "upon an executory contract of purchase contingent upon the erection of buildings thereon shall be deemed the owner, and the vendee the contractor" does not change the actual relation between the vendor and vendee, or vary their legal rights as to each other, or to third persons, except for the purposes of the lien authorized by it. *Schuyler v. Hayward*. 253
6. Defendant H. contracted to sell defendant B. certain premises, and to advance to him \$9,000 to complete some unfinished houses thereon. B. agreed to finish the houses on or before May 1, 1873, and to give his bonds with mortgages on the premises for the purchase-price, with interest to date to May 1, 1873. The houses were not finished until July, 1874. H. acquiesced in the completion of the work after the time had expired. After their completion no deed was tendered or bonds and mortgages given, but H. took possession of, and rented the buildings. In an action to foreclose mechanics' liens filed by sub-contractors, H. claimed to recoup damages sustained because of the delay in completing the buildings. *Held*, that H. was not entitled, by way of damages, to the rental value of the premises for the time between that fixed for the completion of the buildings and the time of their actual completion, as H. was not entitled under the contract to the rents and profits or to the use and occupation of the premises; that the fact that he did receive the rents after the buildings were completed was immaterial, as he did not receive them under the contract; that H. was not entitled to be allowed interest on the purchase-money, as

whatever interest he was entitled to by virtue of his contract he was still entitled to from B., and to the security by mortgage for its payment; and in the absence of proof of special damage, that the lienors were entitled to judgment for the balance unpaid by H. to B. under their contract at the time of filing the liens. *Id.*

7. An action to foreclose a mechanic's lien is not an action "affecting the title to real estate or an interest therein" within the meaning of the amendment of 1874 to section 11 of the Code (chap. 322, Laws of 1874), and a judgment in such an action for less than \$500 is not appealable to this court. *Wheeler v. Scofield.* 811

8. It seems, that under the mechanic's lien law of 1873 (chap. 489, Laws of 1873), one who has performed labor for a contractor in the erection or repairing of a building or who has furnished materials therefor, will be presumed to have done so with the consent of the owner, in the absence of proof of any objection on his part. *Id.*

9. By the terms of a building contract, the work was to be completed by December first; it was not so completed. The contractors were called upon to do extra work, and, with the consent of the owner, continued work until January eighth thereafter, when they failed and discontinued work. The owner did not declare the contract forfeited, but obtained the contractor's consent to go on and finish it. The cost of completing the work was less than the amount unpaid upon the contract, adding thereto the value of the extra work. In an action by a material-man to foreclose a mechanic's lien, *held*, that the owner could not claim the contract forfeited; but the inference was that he undertook to complete the building at the contractor's expense; and that the lienors were entitled to the residue. *Id.*

10. There is no constitutional objection to the creation by the legis-

lature of statutory liens in favor of mechanics and others, for the purposes, and under the circumstances and limitations specified in the statutes known as mechanic's lien laws. *Glacius v. Black.* 568

11. Where, after the commencement and during the pendency, of an action to foreclose a mechanic's lien, the lien expires, the action may still be prosecuted as a personal action, and a personal judgment may be rendered as in an ordinary action upon contract. *Id.*

### MISTAKE.

1. Although a party insured accepts a policy with knowledge of the language used in describing the property insured, if, at the time, he points out a mistake therein, but is prevented from having the same corrected, or is thrown off his guard and dissuaded therefrom, by the acts or declarations of the insurer, he may show the mistake in an action on the policy; and the insurer is estopped from setting up the letter of the contract in bar of the action, and from claiming that the situation of the property does not agree therewith. *Maher v. Hib. Ins. Co.* 288

2. Where the parties to a contract, through a misconception as to the meaning and effect of terms when used in such a contract, use terms which, failing to express their intention, do express a meaning different from that intended, proof of the facts will make a case for a reformation of the contract; and this, although they knew what words were employed and their ordinary meaning. *Id.*

### MONTGOMERY COUNTY.

—*Acts enabling board of supervisors of, to refund certain illegal taxes repealed by act chapter 180, Laws of 1874.*

*See People v. Suprs.*

## MORTGAGE.

1. Under the provision of the Code (§ 282), authorizing the court, where, upon appeal from a judgment, an undertaking requisite to stay execution has been given, to exempt by order from the lien of such judgment real estate upon which it is a lien, and to direct an entry on the docket of judgment that it is "secured on appeal," and declaring that thereupon such judgment shall cease, during the pendency of the appeal, to be a lien upon the property so exempted "as against purchasers and mortgagees in good faith," one who has, during the pendency of the appeal, taken a mortgage "in good faith" upon property so exempted, in payment of an antecedent debt, is protected, and his mortgage has a preference over the judgment. *Union Dime Sngs. Inst. v. Duryea*. 84
2. It is not necessary for him to show that he parted with value on the faith of the mortgage. *Id.*
3. An assignee of a mortgage takes it subject to the equities attending its execution; he stands in the place of the mortgagee and can only enforce it in case it could be enforced by the latter if he had not assigned it. *Crane v. Turner*. 437
4. P. and wife executed a mortgage upon premises of which the former had possession under a contract of sale, which mortgage was duly recorded. P. thereafter received a deed, which was recorded; the mortgage was assigned to plaintiff's testator. P. subsequently sold and conveyed the premises, receiving from the grantee a mortgage for a part of the purchase-money, which was duly recorded; the grantee had notice of the prior mortgage. P. assigned his mortgage to defendant T., assuring him that the mortgage was the first lien. T. searched the records back to the deed to P. In an action to foreclose the first mortgage, T. claimed that his mortgage was entitled to priority. *Held*, unten-

able; that as P. would be estopped from claiming a priority if he had retained the mortgage, his assignee had no superior right and was also estopped; and that the fact that the records showed a perfect chain of title sustaining T.'s mortgage gave it no precedence. *Id.*

5. The only effect of recording an assignment of a mortgage is to protect the assignee against a subsequent sale by the mortgagee of the same mortgage. *Id.*

— *To guardian, by himself individually, validity and effect of.*  
*See Lyon v. Lyon*. 290

*See FORECLOSURE.*

## MOTION AND ORDER.

1. An order denying a motion to set aside a judgment, because of failure to file a proper judgment roll, is not reviewable here; if what was done amounts to a legal nullity, no substantial rights of defendant are impaired by the denial; if the roll is not in due form, or the filing, for any reason, is irregular, the granting or refusing the application is discretionary. *Whitney v. Townsend*. 40
2. A sheriff having several executions in his hands, issued upon judgments rendered in counties outside the judicial district in which he resides, may make a motion in his own county for directions as to the disposition of moneys collected by him, by levy and sale, under the executions. *Phillips v. Wheeler*. 104
3. The provision of the Code (sub. 4, § 401), providing that motions must be made in the district in which the action is triable, or in an adjoining county, etc., refers to motions in an action while it is pending, or such as relate in some way to its pendency or procedure. *Id.*
4. Prior to the making of such a motion the sheriff had commenced an action in the nature of an in-

terpleader against all the execution creditors, to determine their respective rights; some of the defendants answered, one demurred on the ground that the complaint did not state facts constituting a cause of action; the demurrer was sustained by the General Term. The action was pending at the time of making the motion. *Held*, that this was no bar to the motion; that it was at least a matter of discretion with the court whether to grant relief on the motion during the pendency of the action. *Id.*

5. In proceedings under the statute for the sale of the real estate of an infant the petition stated, and the referee to whom it was referred to ascertain the facts reported, that the infant owned an undivided one-half of the premises, and this was the belief of all parties concerned in the proceedings during their progress. A sale was ordered and made, of the interest of the infant, and an order granted approving of the conveyance to the purchaser. Thereafter, in an action of ejectment against the grantee of the purchaser, it was, in effect, determined that the infant only owned an undivided one-third. The purchaser, having made compensation to his grantee for the deficiency, moved, in the proceedings, that the special guardian of the infant be required to refund one-third of the purchase-money. *Held*, that the motion was properly granted. *In re Price.* 231

6. After confirmation of the report of commissioners of appraisal in proceedings by a railroad corporation to acquire title to lands and the making of an order as prescribed by said act (§ 17) as to payment of the award, the railroad company refused to file the papers or enter the order or to pay the award, a motion was made by the landowners to compel the filing of the papers and order, and for "other and further relief." The court made an order granting the specific relief asked in the notice of motion, and also directing the company to pay or deposit the amount of the award as directed in the order of confirmation, and

in default thereof for ten days that a precept issue for its collection. *Held*, no error; that it was the right of the owner to have the papers filed, and that the awarding of a precept, in case of default, was authorized under the amendment of the general railroad act of 1854 (§ 5, chap. 282, Laws of 1854). *In re R. and O. R. Co.* 243

7. Where an order of Special Term, denying a motion involving a question of discretion, states that it is denied solely upon the ground of want of power, and the General Term affirms the same without qualification, it affirms it in all its parts, including the ground upon which, by its terms, it was granted, and its order is appealable to this court. The order cannot be qualified by reference to the opinion of the court. *Hewlett v. Wood.* 394

8. In such case, if it is here determined that the court below erred in its decision as to power, the order will be reversed and the proceedings remitted to the court below for the exercise of its discretion. *Id.*

9. *It seems* that the question whether a party should be deprived of the benefit of the testimony of a witness, examined *de bene esse*, for the reason that the adverse party has lost the opportunity of a full cross-examination, should be determined upon the trial, rather than upon motion, where the facts necessary to present the question appear in the deposition as certified to. *Id.*

10. Where, however, the question depends upon facts not appearing upon the face of the deposition or the certificates but which must be established by evidence *aliunde*, a motion to suppress the deposition would be proper. *Id.*

11. As to whether, in such case, evidence could be given on the trial of the facts alleged, *quære.* *Id.*

12. The deposition may, in the discretion of the court, be suppressed



on motion in advance of the trial. *Id.*

13. Where the opportunity to cross-examine the witness has been lost through his misconduct, or through the fault or omission of the party on whose behalf he is examined, or other like cause, the deposition should be set aside or the testimony rejected. *Id.*

14. Where different actions have been brought by creditors, in behalf of themselves and the other creditors, against an assignee for the benefit of creditors, for an accounting and closing of the trust, the court has power to make an order to compel all the creditors to come in and prove their claims in the suit first brought, or wherein interlocutory judgment is first obtained, and to stay all proceedings in the other actions. *Travis v. Myers.* 542.

15. The terms of the order are within the discretion of the court, and cannot be reviewed here. *Id.*

— *When order to amend judgment nunc pro tunc proper.*  
*See Produce B'k v. Morton.* 199

#### MUNICIPAL CORPORATION.

1. Defendant made, in one of its streets upon which was situated a lot belonging to plaintiff, a gutter and curb, which ended opposite plaintiff's lot, and which conducted the water of the ward down that street; the water having no outlet, flowed upon plaintiff's lot, flooding his house, etc. Before this gutter was made there was a natural course which took off the water another way. A drain could have been made to carry it off. In an action to recover the damages, *held*, that the facts established a cause of action. *Byrnes v. City of Cohoes.* 204
2. The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply where the necessity

for the drainage is caused by the act of the corporation itself. *Id.*

*See NEW YORK (CITY OF).*  
*ROCHESTER (CITY OF).*

#### MURDER.

1. A person, called as a juror upon the trial of an indictment for murder, being challenged, testified that he had heard the killing talked about, had expressed an opinion, and then had an impression or opinion, depending upon the truth of what he had heard; that he thought it would take evidence to remove that impression; but that he would decide the case on the evidence; and believed that he could render an impartial verdict upon the evidence, unbiased by such opinion. *Held*, that the trial court was justified in holding the juror indifferent. *Thomas v. People.* 218
2. Upon the trial the prisoner offered to prove that the deceased had been engaged in several fights with other parties, in each of which he used a knife, and cut his opponent; also, declarations of his as to cutting people with razors, and that all these matters had been communicated to the prisoner; the offers were overruled. *Held*, no error. *Id.*
3. After a witness on the part of the prisoner had testified that he heard the deceased, in an angry dispute, say to the prisoner that, if he ever crossed his path again, he would fix him, the prisoner offered to show that, a few days afterward, the witness heard another person, who was present when the threat was made, state to the prisoner what the deceased threatened. The proof was excluded. *Held*, no error; as there was no suggestion that the prisoner did not hear the threat when made, or had forgotten it. *Id.*
4. After a witness had testified that the prisoner was a quiet man and good natured, as far as he knew, he was asked to "state what his

disposition was when crossed or misused?" This was objected to and excluded. *Held*, no error. *Id.*

5. The crime charged was committed in State prison, where the prisoner and the deceased were confined. The prisoner gave evidence tending to show that the character of the deceased, before he came to the prison, was bad; that he was quarrelsome and vindictive. The prosecution then called witnesses, who were permitted to testify, under objection, that, in the respects stated, his character while in prison was good. *Held*, no error. *Id.*

6. The homicide was committed with a case knife, which the prisoner, a few days before, had ground to a point. He testified that he knew where the heart was located, and that he stuck his knife into it. The court charged, among other things, in substance, that the facts that the prisoner used a deadly weapon, and struck at a vital part of the body of the deceased, are circumstances furnishing presumptive evidence of an intent to take the life of the deceased, but not conclusive. *Held*, no error. *Id.*

7. At the time of his conviction the prisoner was under sentence for a term, several years of which were unexpired. *Held*, that this did not prevent his being sentenced to be hung before the expiration of his term. *Id.*

#### NEGLIGENCE.

1. Plaintiff purchased a ticket at Montreal of the G. T. R. Co. to New York, and had his portmanteau checked through. In an action to recover the value thereof and of its contents, it appeared that it was received by defendant, transported to New York, and there deposited in its baggage-room. When plaintiff demanded it it could not be found, and no account was given of the cause of the disappearance. *Held*, that, without regard to the question whether defendant became liable as common carrier, it incurred at

least the responsibility of a warehouseman; that this evidence made out a *prima facie* case of negligence; and that, therefore, a direction to the jury to render a verdict for defendant was error. *Thurfax v. N. Y. C. and H. R. R. Co.* 11

2. In an action to recover damages for injuries alleged to have been occasioned by the negligence of the driver of one of defendant's street cars, plaintiff's evidence tended to show that he, an infant ten years old, with two companions, desiring to take passage, hailed the car, the driver stopped and the boys started to go to the back platform; the driver told plaintiff to jump on in front; he did so, and was on the first step, attempting to step on to the second, when the driver struck the horses, the car gave a jog, knocking plaintiff off, and he was injured. *Held*, that the evidence justified a verdict for plaintiff; that the fact that he jumped on to the front platform did not, under the circumstances, establish contributory negligence, as matter of law, but it was a question for the jury. *Maher v. C. P., N. and E. R. R. Co.* 52

8. This court cannot interfere with a judgment because excessive damages have been allowed. *Id.*

4. Under the provisions of the general railroad act (§ 44, chap. 140, Laws of 1850; § 8, chap. 292, Laws of 1854) requiring every corporation formed under it to erect and maintain fences on the sides of its road, no exception is made or permission given for openings or gates for the use of the corporation, or its customers or the public generally, but only for the use of adjoining proprietors; and if it permits or acquiesces in the use, in its business by its customers, of a gate constructed by it at a farm crossing, so that the gate does not serve the end of a fence, it is in default. *Spinner v. N. Y. C. and H. R. R. Co.* 153

5. Negligence cannot be imputed to a person simply from the fact that his beasts have escaped from his

well-fenced field on to a railroad track. *Id.*

6. Plaintiff's cattle escaped from his inclosure in the night time on to the highway, and thence through a gate, at the side of defendant's road, which had been left open, upon its track, where they were struck by a passing train, some killed and others injured. The gate, for several years, had been used almost daily in the business of loading and unloading freight; vehicles delivering or taking goods passing in or out thereat. In this business defendant's servants had helped. In consequence the gate was often left open at the close of the day's business, and would be closed in the evening, or at midnight, by defendant's servants. The adjoining proprietor, for whose use the gate was originally erected, had not used it for six weeks prior to the accident, and had no knowledge of its use for his purposes on the preceding day. In an action to recover damages, *held*, that the evidence was sufficient to authorize an inference by the jury, that the gate was open by reason of its use by defendant's customers during that day, or some day shortly prior; that defendant had sufficient notice that the gateway had been diverted from its original purpose to a common passageway for its customers, and that it was often left open in consequence thereof; that the opening of it at all, by its assent or acquiescence, was in contravention of said statute; and that if such use of the gate was not of itself sufficient to charge defendant, it was bound to see that when the use of it for the day was over it was well closed, and for a neglect of this duty it was liable. *Id.*

7. Defendant made, in one of its streets upon which was situated a lot belonging to plaintiff, a gutter and curb, which ended opposite plaintiff's lot, and which conducted the water of the ward down that street; the water having no outlet, flowed upon plaintiff's lot, flooding his house, etc. Before this gutter was made there was a natural course which took

off the water another way. A drain could have been made to carry it off. In an action to recover the damages, *held*, that the facts established a cause of action. *Byrnes v. City of Cohoes.* 204

8. The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply where the necessity for the drainage is caused by the act of the corporation itself. *Id.*
9. Plaintiff's complaint alleged, in substance, that, by reason of the failure of defendant to keep the privies and drains upon his premises in proper repair, the water and filth therefrom was caused to overflow upon plaintiff's premises adjoining and into the cellars of his houses, rendering them unfit for use, interfering with the use of the premises and with the letting thereof and injuring the walls, etc. Upon the trial of the action plaintiff offered evidence to show that he had lost rents in consequence of the flow of the water into his cellars, that the cellars had remained unoccupied since the water came in, and also proof of the rental value of the premises. This was objected to generally and excluded. The court also, in its charge, excluded the rental value of the premises as an element of damages. *Held*, error; that the damages thus sought to be proved, being such as necessarily and naturally resulted from the injury complained of, a special averment thereof in the complaint was not necessary in order to authorize a recovery. *Jutte v. Hughes.* 267
10. Also *held*, that the allegations in the complaint were sufficient to authorize evidence of the loss of the use of the cellars and of the rental thereof, treating it as special damage, particularly as there was no objection on the ground of the insufficiency of the averments. *Id.*
11. The court confined the damages to the injuries done to the walls and cellars. It appeared that

plaintiff incurred expenses in plumbing and fixing the sewers, and that other expenses would be required to prevent further injury from the flow of the water; also, that injuries were sustained because of the stench. *Held*, error; that these were proper items of damage. *Id.*

12. The proof showed that defendant had paved his yard and conducted from the roofs of his houses, in leaders and drains to the privies, an unusual quantity of water beyond the capacity of the drains to carry away. The court charged that if the water did issue from the defendant's yard and he did every thing possible under the circumstances, and practicable in the way of drainage to carry it off from the premises he was not liable. *Held*, error; that if defendant suffered the water improperly to accumulate on his premises so as to flow upon the plaintiff, it did not relieve him from liability that he did all he reasonably could do to carry it off. *Id.*

13. Also, *held*, that the errors specified were not cured by a verdict for defendant; as it could not be assumed that the result would not have been changed had proper instructions been given on the question of damages. *Id.*

14. So long as the owner of property violates no duty which he owes to others or to the State, he cannot be called in question for the manner in which he uses or manages it; and if, in the lawful exercise of his right to so use it, another is injured, he is not liable. *Victory v. Baker.* 366

15. Plaintiff's intestate, P., a lad eighteen years old, lost his life by falling into a vat of boiling liquid in defendants' saltpeter factory where he had gone by direction of his employer to pay a bill due one of the defendants. In the factory were a large number of vats and tanks. The vat into which the deceased fell was at one side and under a passageway nine feet wide at the angle of its intersec-

tion with another leading to defendants' office. There was an opening to the vat, in the floor, closed by a cover, which was removed at the time of the accident. A sky-light was directly over the passageway at this point, making it very light in the daytime. The deceased did not enter the factory at the usual entrance, but crossed an adjoining lot and canal, climbed a fence and entered by a back door, and, in passing along the passage to the office, fell into the vat. Defendants' workmen were in the habit of entering the factory in the same way P. did, and occasionally others did so also. On each of the doors in front was a sign "no admittance" save one where the sign was "no admittance except on business," at which a person was usually in attendance to admit persons to the factory. In an action to recover damages, *held*, that defendants were not liable; that P., if not a trespasser, was, at most, in the factory by defendants' sufferance, and took the risks attendant upon being there in the condition in which the factory was; that no duty rested upon defendants to guard the vat for the protection of the deceased. *Id.*

16. The rule of mercantile law making the master of a vessel liable for the negligent acts of those under his authority, to the same extent as if he was the owner, applies without regard to the question whether the officers or men were employed by himself or the owners. *Kennedy v. Ryall.* 379

17. Defendant was in command of a steamship at quarantine which was directed to be fumigated by the deputy health officer of the port of New York; by his order, the chief steward cleared the passengers from the steerage, and utensils containing some poisonous substance were placed therein for the purpose of fumigation. The health officer gave instructions as to the length of time the steerage should remain closed, and as to the removal of the vessels; one of these, an ordinary drinking cup, was not removed with

the others, and plaintiff's intestate, a child four years and nine months old, who, with his mother, had been ordered by the steward to return to the steerage cabin, drank some of the poison in the cup, and died from the effects thereof. In an action to recover damages, *held*, that it was within the line of the defendant's duty to see that the poison was removed; and for his negligence, or the negligence of his subordinates, in omitting to discharge this duty, he was liable. *Id.*

18. Also *held*, that, as the mother of the deceased had been directed to return to the cabin, she had the right to infer that every thing was safe, and that no extraordinary diligence on her part was required for the protection of her child. *Id.*

19. The rule requiring persons before crossing a railroad track to look to see whether trains are approaching is not applied inflexibly in all cases without regard to age or other circumstances. *McGovern v. N. Y. C. and H. R. R. Co.* 417.

20. In an action to recover damages for the alleged negligent killing of W., plaintiff's intestate, a lad eight years old, it appeared that he was going northerly on the west side of a street, running north and south, in the city of R., on his way to school; said street was crossed by three tracks of defendant's road. The view of the tracks was obstructed so that a person so passing could not see an engine or train approaching from the west, on the south track, until he was within four feet of the track. As W. approached the track a freight train, with an engine at each end, each ringing a bell, was passing west on the middle track. As the rear of the train was crossing the street, W. started to go diagonally across the tracks, in the direction of his school, when he was struck and killed by an engine which was backing down on the south track. Defendant had a flagman at the crossing on the east side of the street. Plaintiff's evidence tended to show that the flagman did not

wave his flag or do any other act to warn W. of danger until at the moment of the accident; also that the engine was going at a speed of eight or ten miles an hour. Persons on the engine could not see the track to the east, on account of the coal in the tender. It was shown that a backing engine could not be so easily stopped as one moving forward, and that when so moving an arrangement for discharging sand on the track, in front of the wheels, to check the engine, could not be applied. The crossing was a dangerous one; the street was traversed by many people, and each morning school children were accustomed to pass at this point. *Held*, that the case was properly submitted to the jury; that it was for them to say whether, under the circumstances, it was prudent to move an engine backward at such a rate of speed without taking other and additional precautions to protect passengers on the street, and that the jury were justified in finding negligence on the part of the flagman; also that the omission of the boy to look to the west before stepping upon the track was not, under the circumstances, contributory negligence, as matter of law. *Id.*

21. A railroad corporation which has parted with the possession and control of its road under a lease thereof to another corporation, containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon a highway, for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. *Ditchett v. S. D. and P. M. R. R. Co.* 425

22. As to whether the lessor of a railroad who has parted with possession can be held liable for the negligence of the lessee, under the statute in question, in a case where it does not apply, *quære*. *Id.*

23. Where a street railroad car is so crowded that, although it may not be physically impossible for one taking passage to enter it, yet that he cannot do so without great

and unreasonable discomfort to himself and to the prior occupants of the car, and the conductor consents to, and does, except from him the usual fare without insisting upon his finding a place within the car, and while riding upon the platform he is thrown off and injured by the negligence of the company or its employes, the fact that he was standing upon the platform does not of itself constitute contributory negligence; but it is a question for the jury. *Ginna v. Second Ave. R. R. Co.* 596

24. So, also, it is not negligence *per se* for one riding upon the platform of the car to omit to take hold of the iron bar or rail to prevent being thrown from the platform. *Id.*

25. Plaintiff drove his horse and cart upon a pier, one-half of which belonged to the city, and which it had suffered to become out of repair and unsafe for use. There was a hole in defendant's half of the pier, through which the horse saw and heard the rush of the water, and being frightened, so that plaintiff was unable to control him, backed the cart against the string piece at the edge of the pier; this, being decayed, gave way, and horse and cart fell into the water and were lost. There was no evidence that the horse was unusually vicious or excitable. In an action to recover damages, *held*, that the fact that the horse became frightened did not, under the circumstances, preclude a recovery; that a horse was not to be considered uncontrollable because it shies or is momentarily beyond control of the driver; and, as the cause of the fright was occasioned by the negligence of the defendant, the question was one for the jury. *Macaulay v. Mayor, etc.* 602

— *Sufficiency of evidence of.*  
*See Weber v. N. Y. C. R. R. Co.*  
(Mem.) 587

# NEW YORK (CITY OF).

1. The provision of the act of 1873 reorganizing the local government

of the city of New York (§ 97, chap. 335, Laws of 1873), which authorizes the board of apportionment to fix the salaries of all officers paid from the city treasury, includes only city officers; *i. e.*, such as are connected with the political organization of the city government. *Whitmore v. Mayor, etc.* 21

2. Clerks of the district courts of the city are not such officers, but judicial officers embraced within the judiciary system of the State. *Id.*

3. Accordingly *held*, that a resolution of the board of apportionment fixing the salaries of such clerks was inoperative, and that they were entitled to the salaries given them by the act of 1872, relating to courts in the city and county of New York. (§ 1, chap. 438, Laws of 1872.) *Id.*

4. Under the provisions of the act of 1813, "to reduce several acts relating particularly to the city of New York to one act" (§ 83, chap. 86, Revised Laws of 1813), the omission of the city corporation to pay an award for land taken for widening a street, within four months after confirmation of the report of the commissioners of estimate and assessment, does not alone give a right of action for its recovery; there must be, in addition, an application to the city for payment after the expiration of the four months by the party entitled thereto. *Fisher v. Mayor, etc.* 73

5. The statute of limitations, therefore, does not commence to run against such a cause of action until application is so made. *Id.*

6. Under said act, until the confirmation of the report of said commissioners, no lien is created by the proceedings upon land assessed. *Id.*

7. The inability to find an order of confirmation is not conclusive evidence that no such order was made. It is competent to establish it by other proof. *Id.*

8. It *seems*, that an entry made by the corporation attorney, in his register, of the making of such order is, after his death, admissible to prove that fact. *Id.*
9. A copy, however, of an entry made in the register of an attorney, whose death is not proved, is not competent. *Id.*
10. As to an assessment made under said act, prior to the Code, a presumption of payment, attached after twenty years from the entry of the order of confirmation, which presumption can only be rebutted by proof of actual payment of a portion thereof within twenty years, or by a written acknowledgment of indebtedness or liability; proof that the assessment has not, in fact, been paid does not rebut the statutory presumption. *Id.*
11. A certificate of the absence of fraud given in pursuance of, and by the commissioners appointed by the "act in relation to certain local improvements in the city of New York" (chap. 580, Laws of 1872), cures any irregularities and defects in the proceedings of the common council in passing the ordinances, and any omission to advertise the same, and validates an assessment for repaving a street in the city of New York, upon property for which an assessment has been paid for paving, where the work was done after the passage of said act and prior to the passage of the amendatory act of 1874 (chap. 813, Laws of 1874). *In re Peugnet.* 441
12. The provision of section 7 of said act of 1872, exempting from the effects of such certificate assessments for repaving, only saved the right to have an assessment vacated, for any irregularity or omission to advertise, to persons assessed for a repaving already completed at the time of the passage of the act, or then being done; the amendment of this section by the act of 1874 extending the benefits of this saving clause to those assessed "for work thereafter made, done or performed," took effect only from the time of its incorporation into the original section, and had no retroactive effect. *Id.*
13. An ordinance authorizing the repaving of a street was passed April 29, 1871, an assessment for the work was confirmed January 30, 1874, before the passage of said amendatory act. In a petition presented on application to vacate the assessment it did not affirmatively appear, nor was there any thing shown from which it could be reasonably inferred, that the work was in progress on May 7, 1872, the date of the passage of the original act; the requisite certificate was given by the commissioners. *Held*, that an order vacating the assessment was error. *Id.*
14. As to whether the exception in said section was not confined to cases where the contracts had not been passed upon by the commissioners and declared free of fraud, *quære.* *Id.*
15. The office of chief supervisor of elections, created by the act of congress, passed February 28, 1871 (16 U. S. Stat. at Large, 437), is additional to that of Circuit Court commissioner and not incident or appurtenant thereto. It is therefore within the provisions of the New York charter of 1870 (§ 114, chap. 335, Laws of 1870), which declares that the acceptance of office under the federal government is a relinquishment of any office held under the city; and is not within the exception in said section in favor of commissioners. *Davenport v. Mayor, etc.* 456
16. Accordingly, *held*, that plaintiff, by accepting the office of chief supervisor of election, vacated the office of counsel to the health department, then held by him, and was not entitled to the salary of the latter office after such acceptance. *Id.*
17. Under the provision of the New York charter of 1873 (§ 41, chap. 835, Laws of 1873), prescribing

the manner in which members of the police force may be removed, a public examination and inquiry into the truth of charges made against a member is requisite to his removal. *People ex rel. v. Bd. Police Comrs.* 475

18. Charges were preferred against the relator, a member of the police force. He was dismissed by the board of police commissioners upon a written admission of the truth of the charges, and a consent to waive trial not made to, or in presence of, the board. The accused presented to the board before the day assigned for a hearing a statement under oath, in which he recanted and withdrew the admission, and revoked the waiver of trial. He also fully answered the charges and explained the circumstances under which he made the admission. His answer was corroborated by the affidavits of others. He did not appear at the time designated for the hearing. No proof was made of the genuineness of his signature to the admission except that furnished by the statement. *Held*, that relator was illegally dismissed; that he was not estopped by the admission, the same not having been made as his answer to the charge and to the tribunal having jurisdiction; that his consent to waive trial was revocable, and that the admission was not properly before the board. *Id.*

19. The provision of the act of 1870 making "further provision for the government of the city of New York" (chap. 883, Laws of 1870), vesting in the comptroller of the city the power to fix the salary of the corporation counsel at a sum not exceeding the salary of the recorder, did not repeal the provision of the act of 1854 (§ 1, chap. 123, Laws of 1854), giving to said counsel an annual compensation for his services in street opening cases, to be assessed upon the lands benefited. *O'Gorman v. Mayor, etc.* 486

20. Nor was the said provision repealed by the provisions of the city charter of 1857 (chap. 446, Laws of

1857), or of the charter of 1870 (chap. 137, Laws of 1870), enumerating, among other duties of the corporation counsel, that of conducting the legal proceedings in opening streets, etc., and prescribing the mode of fixing his salary. *Id.*

21. The petitioner filed his petition under chapter 338, Laws of 1858, asking to vacate an assessment for a local improvement in the city of New York. The prayer of the petition was granted by the Special Term, but the order thereon was subsequently vacated by a Special Term order, which was affirmed by the General Term. No order was made, however, denying the prayer of the petition. *Held*, that the General Term order was not appealable under subdivision 8 of section 11 of the Code, as it was not a final order; that the result of the order was to leave the petition undisposed of and ready to be brought again to a hearing. *In re Moore.* 555

22. Plaintiff drove his horse and cart upon a pier, one-half of which belonged to the city, and which it suffered to become out of repair and unsafe for use. There was a hole in defendant's half of the pier, through which the horsesaw and heard the rush of water, and being frightened, so that plaintiff was unable to control him, backed the cart against the string piece at the edge of the pier; this, being decayed, gave way, and horse and cart fell into the water and were lost. There was no evidence that the horse was unusually vicious or excitable. In an action to recover damages, *held*, that the fact that the horse became frightened did not, under the circumstances, preclude a recovery; that the horse was not to be considered uncontrollable because it shies or is momentarily beyond the control of the driver; and, as the cause of the fright was occasioned by the negligence of the defendant, the question was one for the jury. *Macaulay v. Mayor, etc.* 602

— *Mechanic's lien, on wharves or piers in city of.*  
*See Collins v. Drew.* 149



- *Mechanic's lien, law for.*  
*See Schuyler v. Hayward.* 253  
 — *Authority of health officer of port of New York over vessels at quarantine.*  
*See Kennedy v. Ryall.* 379  
 — *Salary of corporation counsel.*  
*See O'Gorman v. Mayor, etc.* 486  
 — *Term of office of clerk of Eighth District Court of.*  
*See People ex rel. Healy v. Leask.* 521

## NEW YORK (COUNTY OF).

1. The provisions of the act of 1869 providing for the government of the county of New York (§ 7, chap. 875, Laws of 1869) which prohibits the board of supervisors of said county from increasing salaries, "except as provided by acts of the legislature," does not apply where the legislature has expressly authorized said board to increase the salary. *Taylor v. Mayor, etc.* 87
  2. Accordingly, *held*, that a resolution of said board passed December 28, 1869, under the authority of the act of 1855, in relation to the salaries of certain judicial officers (§ 1, chap. 575, Laws of 1855), authorizing it to increase the salaries of the city judge and other officers, which resolution increased the salary of the city judge to \$15,000 a year, to take effect January 1, 1870, was valid; and that under the provisions of the act of 1870, relating to jurors for the city and county of New York (§ 17, chap. 539, Laws of 1870), providing that the salary of the commissioner of jurors "shall be at the same rate as the salary paid to the city judge," the said commissioner was entitled to a salary of \$15,000 per annum. *Id.*
  3. Also, *held*, that the act of 1872 (chap. 367, Laws of 1872) confirming said resolution was not controlling to show that the resolution was invalid prior thereto; but was in the nature of a declaratory act. *Id.*
  4. Also, *held*, that the fact that the city judge, either by accident or design, was not actually paid at the rate of \$15,000 after January, 1870, did not affect the rights of said commissioner of jurors; the intent was to give him the salary the city judge was entitled to, and whether the latter officer received it or not was immaterial. *Id.*
  5. Prior to the passage of the city charter of 1873 (chap. 335, Laws of 1873) the office of commissioner of jurors was not a city office, and the provision of said act (§ 97) authorizing the board of apportionment to reduce the salary of all officers paid from the city treasury, "whose offices *now* exist," did not apply to such office, as it only included city offices then existing, not those made city offices by the act itself. *Id.*
  6. Accordingly, *held*, that a resolution of the board of apportionment, fixing the salary of said commissioner at \$5,000 on July 1, 1873, was invalid. *Id.*
  7. *It seems*, that a resolution of the board of apportionment that the salary of a city officer "be fixed" at a less sum than that theretofore paid has the effect to reduce the salary, the same as if the word "reduce" had been used in the resolution. *Id.*
  8. Plaintiff, who at the time of the passage of said charter of 1873 was commissioner of jurors, continued to discharge the duties of the office after April 1, 1873, the time when, by the provisions of said charter (§ 117), his term of office expired, and up to April 1, 1874, no successor having been appointed, *held*, that this was to be regarded as holding over under the provisions of the Revised Statutes (1 R. S., 117, § 9); and that plaintiff was entitled to his salary up to the time he ceased to act. *Id.*
  9. In an action against the city of New York for an unpaid salary, interest is only recoverable from the time of demand. *Id.*
- *Supervisors of, have authority to direct purchase of furniture for Ludlow street jail.*  
*See Schenck v. Mayor, etc.* 44

NEXT OF KIN.

— *When term in will does not include widow.*  
*See Murdock v. Ward.* 887

OFFICE AND OFFICER.

1. The office of chief supervisor of elections, created by the act of congress, passed February 28, 1871 (16 U. S. Stat. at Large, 487), is additional to that of Circuit Court commissioner, and not incident or appurtenant thereto. It is therefore within the provisions of the New York charter of 1870 (§ 114, chap. 335, Laws of 1870), which declares that the acceptance of office under the federal government is a relinquishment of any office held under the city; and is not within the exception in said section in favor of commissioners. *Davenport v. Mayor.* 456

2. Accordingly *held*, that plaintiff, by accepting the office of chief supervisor of election, vacated the office of counsel to the health department, then held by him, and was not entitled to the salary of the latter office after such acceptance. *Id.*

3. The provision of the act of 1870 making "further provision for the government of the city of New York" (chap. 383, Laws of 1870), vesting in the comptroller of the city the power to fix the salary of the corporation counsel at a sum not exceeding the salary of the recorder, did not repeal the provision of the act of 1854 (§ 1, chap. 122, Laws of 1854) giving to said counsel an annual compensation for his services in street opening cases, to be assessed upon the lands benefited. *O'Gorman v. Mayor, etc.* 486

4. Nor was the said provision repealed by the provisions of the city charter of 1857 (chap. 446, Laws of 1857), or of the charter of 1870 (chap. 187, Laws of 1870), enumerating, among other duties of the corporation counsel, that of conducting the legal proceedings in opening streets, etc., and

prescribing the mode of fixing his salary. *Id.*

5. Although, as a general rule, where a statute prescribes the duties to be performed by an officer and the mode of fixing his salary, the necessary implication is that the salary so fixed is intended as a full compensation for all the prescribed duties, and supersedes all previous statutory enactments making special compensation for any of them; it does not apply where there are special enactments showing that it was intended that the officer should receive compensation for certain services in addition to his salary, and payable ultimately from a different source. *Id.*

6. Clerks of District Courts of New York city, judicial officers and their salaries cannot be fixed by board of apportionment. *Whitmore v. Mayor, etc.* 21

*See* SUPERVISORS.  
 COMMISSIONER OF JURORS  
 (N. Y.).  
 HEALTH OFFICER.  
*See Kennedy v. Ryall.* 380  
 — *Term of office of clerk of Eighth District Court of New York city.*  
*See People ex rel. Healy v. Leask.* 531

PARENT AND CHILD.

In an action brought by a father as administrator, under the statute (chap. 450, Laws of 1847; chap. 256, Laws of 1849), to recover damages for the death of his infant son, where the recovery is for his exclusive benefit, he may proceed for and recover his whole damages, including the loss of services of his son during minority. The recovery will be a bar to another action by the father, as such, assuming that he has a right of action independent of the statute. *McGovern v. N. Y. C. and H. R. R. Co.* 418

PARTIES.

— *When action against R. R. Co. for loss of goods carried in agent's*

*baggage, properly brought in name of owner.*

*See Sloman v. G. W. R. Co.* 208

— *When personal representatives of deceased defendant improperly substituted.*

*See Hauck v. Craighead.* 432

### PARTNERSHIP.

1. Plaintiff and defendant entered into a verbal agreement to purchase and improve real estate on joint account, sharing equally the profits and losses. Under this arrangement two farms were purchased, which were conveyed to the parties jointly. A third farm was contracted for by their agent in his own name, but defendant, without the knowledge or consent of plaintiff, procured an assignment of the contract and a conveyance of the farm to himself. The parties made permanent improvements from time to time at their joint expense upon, and purchased cattle and other property for, all and each of the farms. All three were treated alike, and plaintiff, with the knowledge of defendant, directed about work and improvements upon the last one purchased and made payments therefor, he and defendant visiting it together, talking in reference to disposing of the personal property thereon and of an interest therein, without any intimation on the part of defendant that plaintiff was not a joint owner with him. Plaintiff advanced money from time to time on account of all the purchases without distinction. In an action to compel defendant to convey an undivided interest in said farm to plaintiff, *held*, that the agreement was not within the statute of frauds, but was valid as forming a partnership for the purchase of lands; that the farm in question was included in the agreement, and the defendant, having taken title in fraud of plaintiff's right, a resulting trust arose in favor of the latter; that it was not necessary for plaintiff to resort to an action to dissolve the partnership and for an accounting, but

that plaintiff was entitled to the relief sought. *Traphagen v. Burt.* 30

2. After discovery by plaintiff of the fact that the farm was conveyed to defendant, the parties entered into an agreement that plaintiff should convey to defendant his interest in one of the other farms, and in the personal property thereon, defendant agreeing, among other things, to convey to plaintiff an undivided one-half interest in the farm in question. The agreement was fully executed save in respect to such conveyance, which defendant refused to execute. *Held*, that aside from the question of the copartnership, plaintiff was entitled to and could enforce a specific performance in this particular. *Id.*

3. Where one of two copartners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes in equity the principal debtor and the latter a surety; and this relationship a firm creditor having notice of the agreement is bound to observe. *Colgrove v. Tallman.* 95

4. Where a creditor, having such notice, is requested by the partner, who thus became surety, to collect his claim, and he refuses or neglects so to do, if, at the time of the request, the principal was solvent and able to pay, but thereafter becomes insolvent, the surety is discharged. *Id.*

### PATENTS (FOR LANDS).

One S. being the owner of a tract of land on the east side of, and bounded on the west by, the Hudson river, caused a map thereof to be made and filed. On this map lots were laid down as abutting on the easterly side of North River street, a street represented as running along the shore of the river. The street was never opened or used by the public; and in front of one of the lots, numbered 61, the greater part of the

street was below high-water mark. The grantees of B. conveyed lot 61, describing the western boundary as running along the easterly line of North River street, and defendant became the owner by deed containing the same description. Defendant applied to the commissioners of the land office for a grant of the land under water in front of lot 61, representing in his application that he was the owner of the adjacent land. The application was granted and letters patent issued to him. In an action brought to vacate the grant, *held*, that it was made without authority, and was properly vacated (1 R. S., 208, § 67); that defendant was not the owner of the land adjacent to the river, but simply of an easement therein; and that only the owner of the fee was entitled to the grant. *People ex rel. v. Colgate.* 513

#### PENALTY.

1. The provision of the insurance law of 1853 (chap. 463, Laws of 1853), as amended in 1862 (chap. 300, Laws of 1862), and in 1865 (chap. 328, Laws of 1865), which provides for the incorporation of companies to make insurance, among other things, "against loss, damage or liability arising from any unknown or contingent event whatever, which may be the subject of legal insurance," except fire, marine and life insurance, embraces insurance against accidents or damage to plate-glass arising from causes other than fire. *People v. McCann.* 506
2. One acting, therefore, within this State as the agent in receiving and procuring applications for insurance for such company organized under the laws of another State, which company has not filed with the superintendent of the insurance department a certificate showing it to be possessed of the capital prescribed by said act (§ 14), is liable for the penalty imposed thereby. (§ 18.) *Id.*
3. A recovery may also be had against such agent for the penalty

imposed by the act of 1861 (chap. 334, Laws of 1861) upon the agent of a foreign insurance company, in case of the failure of the company to file the annual statement required by that act. *Id.*

4. The only effect of the act of 1878 in relation to the organization of plate-glass insurance companies was to reduce the amount of deposit required of such companies. It did not abrogate the penalties imposed by the said act of 1853. *Id.*
5. To maintain an action to recover the penalty imposed by said act of 1853, it is not necessary to set forth the statute in the complaint; it is sufficient to state that the acts complained of were in violation of the insurance statutes of the State. *Id.*

#### PERSONAL PROPERTY.

Where one having an interest in lands dies intestate after the sale thereof, his interest in the money realized from the sale is personal estate and goes to the administrators, not to the heirs at law. *Denham v. Cornell.* 556

#### PIERS AND WHARVES.

- *Mechanic's liens on.*
- See Collins v. Drew.* 149
- *Liability of municipal corporation for neglect to repair.*
- See Macauley v. Mayor, etc. (Mem.)* 602

#### PLEADINGS.

1. Plaintiff's complaint alleged, in substance, that he pledged certain bonds to defendant as security for advances to be made; that he tendered the amount advanced and demanded the bonds, but defendant refused to deliver, and converted them to his own use. The answer denied these allegations, and set up, in substance, that the bonds were delivered to defendant with authority to sell, etc. Upon the trial, defendant offered to

prove that plaintiff did not own the claim in suit. This was objected to on the ground that it was not set up in the answer, and objection sustained. *Held*, no error; that in the absence of an averment of title in a third person, with which defendant connected himself, or that plaintiff was not the real party in interest, the evidence offered was inadmissible. *Smith v. Hall*. 48

2. Also *held*, that a counter-claim was not proper, as the action was for conversion; and that plaintiff, by replying to a counter-claim, did not waive the objection. *Id.*

3. Under section 150 of the Code a defendant may interpose as many defences or counter-claims as he may have, and an objection of inconsistency between them is not available. *Bruce v. Burr*. 237

4. In an action, therefore, for breach of a contract of sale, defendant may set up a rescission of the contract on the ground of fraud or mistake, and also, breach of warranty on the part of plaintiff. *Id.*

5. Where the complaint in an action upon a policy of fire insurance, sets forth facts showing that the parties were mistaken as to the effect of the language used, the averments are sufficient to authorize a reformation of the contract, although there is no direct allegation of a mistake of fact. *Maher v. Hib. Ins. Co.* 233

6. Plaintiff's complaint charged P. (originally a defendant), and defendant H. as joint contractors upon a contract executed by plaintiff and H. and signed by P. on the margin. The name of the latter did not appear in the contract. P. died after the commencement of the action and his executors were substituted as defendants in his stead. *Held*, that the complaint was properly dismissed as to the executors of P.; that the action would necessarily have failed had P. lived, unless a joint obligation was established; that unless an action could have been brought against the surviv-

ing debtor and the personal representatives of the deceased, the latter were improperly substituted and joined as defendants with H., the survivor; that such an action could not have been maintained without an averment in the complaint of plaintiff's inability to procure satisfaction from the survivor; also that if P. was a mere surety for H., then by his death his estate was absolutely discharged from all liability. *Hauck v. Craighead*. 432.

7. To maintain an action to recover the penalty imposed by the insurance act of 1853, upon an agent doing business for a foreign insurance company which has not filed the required certificate, it is not necessary to set forth the statute in the complaint; it is sufficient to state that the acts complained of were in violation of the insurance statutes of the State. *People v. McCann*. 507.

8. A defendant may raise by answer the question of a loss of jurisdiction by a State court, by reason of proceedings taken under the laws of the United States for a removal of the cause to the federal courts; and upon proof of proceedings, taken regularly and in strict accordance with said laws, he is entitled to judgment adjudging all subsequent proceedings in the State court void. *Shaft v. Phoenix Ins. Co.* 544

— *Sufficiency of complaint to authorize proof of special damages.*  
*See Jutte v. Hughes*. 267

#### PLEDGE.

1. Where one holding securities in pledge for a loan, in pursuance of a sale thereof made by the owner, delivers the same to the purchaser, receives the purchase-price, and after deducting the amount of the loan pays over the residue to the owner, this is not an affirmation by the pledgee of the genuineness of the securities, and, in the absence of fraud, an action cannot be sustained against him by the purchaser to recover back the pur-

chase-price in case the securities prove to be forgeries. *Baker v. Arnot.* 448

against a member is requisite to his removal. *People ex rel. v. Bd. Police Comrs.* 475

2. One R. agreed with the agent of defendants' testator A. for a loan for sixty days upon certain forged railroad bonds. The agreement was for a loan of eighty-five per cent on the face of the bonds for sixty days at one and one-half per cent per month, with seven per cent rebate in case the loan was taken up before, R. having the privilege of taking it up at any time. After the terms of the loan were settled, the agent proposed that to avoid trouble the bonds should be sold to A. direct, he giving a contract to sell them back in sixty days for the amount of the loan and the sum agreed to be paid therefor. This form of the transaction was accordingly adopted, the bonds delivered, the money advanced and the contract signed and delivered on behalf of A. R. subsequently contracted to sell the bonds to plaintiff; the bonds were delivered by A.'s agent, who received the purchase-money, deducted the amount due A. and paid over the residue to R. In an action to recover back the purchase-money, *held*, that, whether the loan was usurious or not, A. had no title to the bonds, save as pledgee, the title remaining in R., who had the right to sell them and to require A. to deliver at any time on being paid the loan; that the question of usury was one between R. and A., which in no manner affected the rights of plaintiff; that defendants were not estopped from setting up the real transaction, because the form of a sale was resorted to to evade the usury laws; and that they were not responsible for the genuineness of the bonds. *Id.*

# POLICE.

1. Under the provision of the New York charter of 1873 (§ 41, chap. 835, Laws of 1873), prescribing the manner in which members of the police force may be removed, a public examination and inquiry into the truth of charges made

2. Charges were preferred against the relator, a member of the police force. He was dismissed by the board of police commissioners upon a written admission of the truth of the charges, and a consent to waive trial not made to, or in presence of, the board. The accused presented to the board before the day assigned for a hearing a statement under oath, in which he recanted and withdrew the admission, and revoked the waiver of trial. He also fully answered the charges and explained the circumstances under which he made the admission. His answer was corroborated by the affidavits of others. He did not appear at the time designated for the hearing. No proof was made of the genuineness of his signature to the admission except that furnished by the statement. *Held*, that relator was illegally dismissed; that he was not estopped by the admission, the same not having been made as his answer to the charge to the tribunal having jurisdiction; that his consent to waive trial was revocable; and that the admission was not properly before the board. *Id.*

# PRESUMPTION.

1. As to an assessment for street improvement in New York city, made under the act of 1813 (chap. 86, Rev. Laws of 1813), prior to the Code, a presumption of payment, attached after twenty years from the entry of the order of confirmation, which presumption can only be rebutted by proof of actual payment of a portion thereof within twenty years, or by a written acknowledgment of indebtedness or liability; proof that the assessment has not, in fact, been paid does not rebut the statutory presumption. *Fisher v. Mayor, etc.* 74

2. *It seems*, that under the mechanic's lien law of 1873 (chap. 489, Laws of 1873), one who has performed

labor for a contractor in the erection or repairing of a building, or who has furnished materials therefor, will be presumed to have done so with the consent of the owner, in the absence of proof of any objection on his part. *Wheeler v. Scofield*. 811

### PRINCIPAL AND AGENT.

1. Plaintiffs contracted to sell \$50,000 of gold at 141½ currency, to be delivered September 24, 1869; defendant was the common agent for dealers in gold, employed in the settlement of their contracts. Plaintiffs did not furnish the gold to fulfill their contract, but defendant furnished and delivered it, receiving the currency agreed to be paid therefor. Plaintiffs thereafter tendered to defendant the amount of gold so delivered and demanded the currency received, which the latter refused to pay. In an action to recover the same, *held*, that while defendant was not bound to perform the contract on behalf of plaintiffs, as they did not furnish the gold; yet, having done so, it was estopped from denying plaintiffs' right to the benefit of the contract; that plaintiffs, by asserting their claim to the money received, adopted and ratified the acts of defendant, and the rights and obligations of the parties were to be determined by the rules governing the relation of principal and agent; that while defendant could not make a profit to itself, yet having acted in good faith it could not be compelled to suffer a loss; that the gold furnished would not be treated as a loan, but defendant was entitled to retain as an indemnity for furnishing it so much of the currency received as the gold was actually worth at the time, and plaintiffs were only entitled to the surplus; also that it was immaterial whether defendant bought the gold for delivery or furnished it from its own funds. *Fowler v. N. Y. Gold Ex. Bk.* 188

2. Evidence was given tending to show that the delivery was from

gold of dealers deposited in defendant's clearing department, for which it had accounted. Evidence was offered on its part as to the actual cost of the gold, and of the performance by it of the contract, which was objected to and excluded. *Held*, error. *Id.*

— *Action against railroad company for loss of goods carried by agent as passenger, properly brought by owner.*

*See Sloman v. G. W. R. Co.* 208

— *Knowledge on part of insurance agent of falsity of warranty does not relieve from forfeiture.*

*See Bartsau v. M. L. Ins. Co. (Mem.)* 595

### PRINCIPAL AND SURETY.

1. Where one of two copartners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes in equity the principal debtor and the latter a surety; and this relationship a firm creditor having notice of the agreement is bound to observe. *Colgrove v. Tallman.* 95
2. Where a creditor, having such notice, is requested by the partner, who, thus became surety, to collect his claim, and he refuses or neglects so to do, if, at the time of the request, the principal was solvent and able to pay, but thereafter becomes insolvent, the surety is discharged. *Id.*
3. Upon the death of one of the makers of a joint promissory note, who signed simply as surety, his estate is absolutely discharged from the payment thereof, both in law and equity. *Bisley v. Brown.* 160
4. It is immaterial that the surety died after a joint judgment against him and his principal; nor is his position affected by the fact that an appeal on his part was pending at the time of his death, and that he had given an undertaking upon such appeal, providing for the payment of the judgment if affirmed. *Id.*

5. Where, therefore, a motion was made to substitute the personal representatives of a surety, against whom and his principal a joint judgment had been obtained, as defendant in his stead, he having died after affirmance by the General Term, and during the pendency of an appeal to this court, upon which appeal an undertaking had been given staying execution, *held*, that the motion must be denied; that there could be no propriety in the substitution, as the judgment could never be enforced or properly affirmed; that the appeal could not be continued simply for the purpose of enabling the plaintiff, in case of affirmance, to bring an action upon the undertaking, as there could be no liability upon the undertaking after the judgment had been discharged, either by act of the parties or operation of law. *Id.*
6. R., defendant's testator, guaranteed the payment of rent by lessees of plaintiffs' testator. By the terms of the lease the rent was to be paid in quarterly installments. Two installments falling due May and August, 1874, not having been paid, plaintiffs brought separate actions therefor against the lessees, perfected judgments upon inquests October 6, 1874, and immediately issued executions. Thereafter, on the same day, an order was obtained and served staying plaintiffs' proceedings on the judgments for the purposes of a motion to open the defaults. Upon the motion an order was made allowing defendants to defend, the judgments and executions, however, to stand as security. A stipulation was then entered into between plaintiffs' attorney and the lessees, that the executions should be countermanded and all proceedings on one of the judgments stayed until November 25, 1874, and on the other until January 10, 1875, when the lessees promised to pay the same, with all sheriff's fees, plaintiffs being authorized to collect rents from subtenants and apply in payment of the judgments. In an action upon the guaranty, *held*, that, assuming the judgments to be valid (and they must be so regarded after the stipulation by which any defence was waived), the stipulation operated to postpone the payment of the rents so as to prevent their collection in any form until the days specified; that the agreement to extend the time was for a good consideration; and that the surety was thereby discharged. *Ducker v. Rapp.* 464
7. It was also provided in the stipulation that, in case legal proceedings were commenced to collect the rent due November 1, 1874, the time for defendants to answer should be extended until February 5, 1875. *Held*, that thereby plaintiffs put it out of their power to procure a judgment for over ninety days after the rent accrued; that the provision would have bound the surety in case he had paid the rent; that the intent was to postpone payment and that the surety was discharged from the payment of this installment. *Id.*
8. Plaintiffs sued to recover the rent as executors; they should have claimed as trustees. *Held*, that the same persons being entitled to recover, although in a different capacity, the manner of commencing the actions did not impair the validity of the agreement. *Id.*
9. It was objected that plaintiffs' attorneys had no authority to make the stipulation. It appeared that one of the plaintiffs was present and consented thereto. *Held*, that it was to be presumed that the attorneys were employed to collect the rents under the will of the testator, and their mistake in attempting to recover in the name of plaintiffs as executors instead of trustees did not impair the acts within the scope of their authority, and that the presence and assent of one of the plaintiffs rendered it unnecessary to consider the extent of their authority. *Id.*
10. *It seems*, that the withdrawal of the executions did not of itself, under the circumstances, operate to discharge the surety *pro tanto*. *Id.*



11. Also *held*, that the stipulation did not impair the obligation of the surety as to other installments than those specified. *Id.*

— *Estate of deceased surety discharged from liability on joint obligation.*

*See Hauck v. Craighead.* 432

— *Contract of surety construed.*  
*See Wilson v. Edwards.* (Mem.) 591

#### PRIVILEGED COMMUNICATION,

1. The provision of the Revised Statutes (2 R. S. 406, § 73) prohibiting a physician from disclosing any information received by him necessary to enable him to prescribe for a patient includes not only information from statements of the patient, but such knowledge as the physician may acquire from the patient, from statements of others present at the time, or from his own observation of the patient's symptoms and appearance. *Edington v. Mut. Ins. Co.* 185
2. It will be presumed from the relationship of the parties that information so imparted was given or obtained for the purpose of enabling the physician to prescribe for the patient, and so, that it was material. *Id.*
3. Accordingly, *held*, in an action upon a policy of life insurance, that an offer, upon the part of the defendant, to prove by a physician who had been consulted professionally by the assured, that prior to the application he was afflicted with certain diseases for which the witness treated him, was properly excluded, although the testimony was expressly limited to what the witness knew, independent of any information given or statements made by the assured. *Id.*
4. The right of objecting to the disclosure of such privileged communication is not limited to the patient and his personal representations, but an assignee may exer-

cise it, and his right is not affected by the decease of the patient. *Id.*

5. The statutory prohibition above referred to is not repealed by the section of the Code (§ 390) authorizing the examination of an adverse party as a witness. *Id.*

#### QUARANTINE.

The authority given to the health officer of the port of New York by the statute (chap. 275, Laws of 1850) to take charge of a vessel subject to quarantine, and to control and direct, so far as necessary for quarantine purposes, the master and other employes thereon, is but temporary and specific: and the officers and men employed upon the vessel are not in any sense his agents or servants after his duties on board the vessel are performed and he has left it; it devolves upon the master to see that the vessel is restored to a proper condition for the comfort and safety of passengers. *Kennedy v. Ryall.* 379

#### QUESTIONS OF LAW AND FACT.

Plaintiffs contracted to put an attic story and mansard roof on the house of defendant, the final payment to be made when the work was "done and completely accepted." The contract specified that the sides of the attic story were to be covered with plank, the frame "to be sheathed with pine boards, sheathing to be covered with felt." In an action upon the contract to recover the final payment defendant's evidence tended to show that a strip two or three feet wide, extending across the house on one side in the new attic story, was left by plaintiffs without any felt covering the sheathing. *Held*, that the contract required plaintiffs to cover the entire sheathing with felt; that this was a question of law for the court, and a submission thereof to the jury was error. *Glacius v. Black.* 563

— When question of contributory negligence one of fact.

See *Maier v. C. P., N. and E. R. R. Co.* 53

— When question of laches one of fact.

See *Wooster v. Sage.* 68

— When, in action upon policy of life insurance, the question whether the assured omitted to give information called for is one of fact.

See *Edington v. Mut. L. Ins. Co.* 185

— When question of notice to railroad company that passenger's trunk contains merchandise one of fact.

See *Sloman v. G. W. R. Co.* 208

— Question as to what form parts of a building contract.

See *Cook v. Allen.* (Mem.) 578

— When question of negligence one of fact.

See *Ginna v. Second Ave R. R. Co.* (Mem.) 596

See *Macaulay v. Mayor, etc.* (Mem.) 602

## QUO WARRANTO.

1. Under the provisions of the Code (§ 432) authorizing actions in the nature of a *quo warranto* to try the title to office, no positive duty is imposed upon the attorney-general to bring an action upon request of a party claiming office from which he is expelled, but it is a matter within his discretion, and the courts cannot sit in judgment upon his exercise thereof or coerce his action. *People ex rel. v. Fairchild.* 334

2. Accordingly held, that a *mandamus* would not lie at the instance of a claimant to an office to compel the attorney-general to commence such an action. *Id.*

3. No superior right to compel action on the part of the attorney-general is given by the fact that the incumbent of the office holds under a law attempting to abrogate the form of government of a municipal corporation, and to create a new one; which law is claimed by the contestant to be unconstitutional, the attorney-general cannot be compelled to bring an action to settle that question. *Id.*

## RAILROAD COMPANIES.

1. Plaintiff purchased a ticket at Montreal of the G. T. R. Co. to New York, and had his portmanteau checked through. In an action to recover the value thereof and of its contents, it appeared that it was received by defendant, transported to New York, and there deposited in its baggage-room. When plaintiff demanded it it could not be found, and no account was given of the cause of the disappearance. *Held*, that, without regard to the question whether defendant became liable as common carrier, it incurred at least the responsibility of a warehouseman; that this evidence made out a *prima facie* case of negligence; and that, therefore, a direction to the jury to render a verdict for defendant was error. *Fairfax v. N. Y. C. and H. R. R. Co.* 11

2. In an action to recover damages for injuries alleged to have been occasioned by the negligence of the driver of one of defendant's street cars, plaintiff's evidence tended to show that he, an infant ten years old, with two companions, desiring to take passage, hailed the car, the driver stopped and the boys started to go to the back platform; the driver told plaintiff to jump on in front; he did so, and was on the first step, attempting to step on the second, when the driver struck the horses, the car gave a jog, knocking plaintiff off, and he was injured. *Held*, that the evidence justified a verdict for plaintiff; that the fact that he jumped on to the front platform did not, under the circumstances, establish contributory negligence, as matter of law, but it was a question for the jury. *Maier v. C. P., N. and E. R. R. Co.* 52

3. Where in an action against a railroad company for unlawfully ejecting a passenger from its cars, the case, as made by plaintiff, is one where punitive damages may be allowed, evidence on the part of the conductor that at the time he ejected plaintiff he believed

that plaintiff had not surrendered a ticket entitling him to be carried, also, that he believed it to be his duty to put plaintiff off if he did not pay his fare, is competent upon the question of damages. *Yates v. N. Y. C. and H. R. R. Co.* 100

4. In order to present the point of the immateriality of the evidence on the question of compensatory damages, plaintiff's counsel should, when the evidence is offered, disclaim any claim for any further damages. *Id.*

5. Where, in such an action, the verdict is for the defendant, the reception of erroneous evidence on its part, on the subject of damages, is not a ground for reversal, as it could not have produced any inquiry. *Id.*

6. Under the provisions of the general railroad act (§ 44, chap. 140, Laws of 1850; § 8 chap. 282, Laws of 1854), requiring every corporation formed under it to erect and maintain fences on the sides of its road, no exception is made or permission given for openings or gates for the use of the corporation, or its customers or the public generally, but only for the use of adjoining proprietors; and if it permits or acquiesces in the use, in its business by its customers, of a gate constructed by it at a farm crossing, so that the gate does not serve the end of a fence, it is in default. *Spinner v. N. Y. C. and H. R. R. Co.* 153

7. Negligence cannot be imputed to a person simply from the fact that his beasts have escaped from his well-fenced field on to a railroad track. *Id.*

8. Plaintiff's cattle escaped from his inclosure in the nighttime on to the highway, and thence through a gate, at the side of defendant's road, which had been left open, upon its track, where they were struck by a passing train, some killed and others injured. The gate, for several years, had been used almost daily in the business

of loading and unloading freight; vehicles delivering or taking goods passing in or out thereat. In this business defendant's servants had helped. In consequence the gate was often left open at the close of the day's business, and would be closed in the evening, or at midnight, by defendant's servants. The adjoining proprietor, for whose use the gate was originally erected, had not used it for six weeks prior to the accident, and had no knowledge of its use for his purposes on the preceding day. In an action to recover damages, *held*, that the evidence was sufficient to authorize an inference by the jury, that the gate was open by reason of its use by defendant's customers during that day, or some day shortly prior; that defendant had sufficient notice that the gateway had been diverted from its original purpose to a common passageway for its customers, and that it was often left open in consequence thereof; that the opening of it at all, by its assent or acquiescence, was in contravention of said statute; and that if such use of the gate was not of itself sufficient to charge defendant, it was bound to see that when the use of it for the day was over it was well closed, and for a neglect of this duty it was liable. *Id.*

9. Where a railroad company receives the trunks of a passenger with notice that they contain property other than the passenger's baggage, and charges and receives an extra compensation for their transportation, an agreement to carry the property as freight may be inferred therefrom, and proof of these facts will sustain a recovery for loss of the property. *Sloan v. G. W. R. Co.* 208

10. Where in such case the property is not that of the passenger, but is in his hands as agent of the owner, and he makes the contract and pays the compensation for its carriage for account of and in the conduct of the business of his principal, an action is properly brought in the name of the latter to recover for the loss. *Id.*

11. Plaintiff's son, a lad eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggagemaster at a railroad depot, and when asked where he wanted them checked to, replied that he did not then know, as he had sent a despatch to a customer at F. to know if he wanted any goods; if not he wanted them to go to R., where he expected to meet some customers. Soon after he had them checked to R., paying two dollars and receiving a receipt ticket for them, headed "receipt ticket for extra baggage," etc. They were not weighed, and no evidence was given as to any regulation of the company in reference to charging extra compensation for passengers' baggage. *Held*, that the evidence justified the submission to the jury of the question of notice as to the contents of the trunks. *Id.*
12. The fact that a railroad corporation is in possession of lands as lessee under an unexpired lease, is no impediment to proceedings on its part under the general railroad act to acquire title in fee; the condemnation of the title does not impair the obligation of a covenant to surrender, or any other covenant in the lease, but simply transfers them with the title. *Kip v. N. Y. and H. R. R. Co.* 227
13. Where, after the commencement of proceedings by a railroad corporation to acquire title to lands, it leases its road to another company for a long term of years, the lease does not, *per se*, operate to abrogate the proceedings; the land sought to be condemned may be as necessary, for the purposes of the corporation instituting the proceedings, after as before the lease; but if the necessity is only in favor of the lessee, it is competent for it to continue the proceedings in the name of the lessor. *Id.*
14. After the confirmation of the report of commissioners of appraisal appointed in proceedings instituted by a railroad corporation under the general railroad act (chap. 140, Laws of 1850) to acquire lands for the purposes of its road, the corporation cannot, without leave of the court, abandon the proceedings and refuse to pay the award made to the owner. Upon confirmation of the report mutual rights become vested in the parties and the corporation cannot, of its own option, recede. The confirmation determines the rights of both parties subject only to the right of review as to the amount of appraisal. *In re R. and C. R. R. Co.* 242
15. It is not necessary, in order to conclude the corporation, that the title to the land should have vested in it under the proceedings. It is sufficient if the right to acquire it on payment of the award is fixed. *Id.*
16. After confirmation of the report of commissioners of appraisal in such proceedings, and the making of an order as prescribed by said act (§ 17) as to payment of the award, the railroad company refused to file the papers or enter the order or to pay the award, a motion was made by the landowners to compel the filing of the papers and order, and for "other and further relief." The court made an order granting the specific relief asked in the notice of motion, and also directing the company to pay or deposit the amount of the award as directed in the order of confirmation, and in default thereof for ten days that a precept issue for its collection. *Held*, no error; that it was the right of the owner to have the papers filed, and that the awarding of a precept, in case of default, was authorized under the amendment of the general railroad act of 1854 (§ 5, chap. 283, Laws of 1854). *Id.*
17. Defendant, in pursuance of an agreement with the B. H. and E. R. R. Co., guaranteed the payment of the interest coupons to the bonds of the latter corporation, a written guaranty thereof

being indorsed upon each bond. Defendant subsequently became possessed of said bonds and transferred a portion of them, with the coupons and guaranties, to plaintiffs' testator for value. In an action upon the guaranties, *held* (ALLEN, J., dissenting), that, even if the guaranties when made, were *ultra vires*, and therefore not binding, defendant having transferred the bonds with the guaranties thereon uncanceled, it was to be presumed that they were intended to be, and were, taken by the purchaser as additional security and as part of the purchase; that they were to be treated as if written at the time of the transfer; and, so treating them, it was immaterial that the true consideration was not expressed therein. *Arnot v. Erie R. Co.* 815

18. The fact that a railroad corporation has constructed and commenced operating its road in reliance upon a title subsequently found to be defective, is no objection to proceedings on its part to perfect its title to lands so occupied, under the provision of the general railroad act (§ 21, chap. 140, Laws of 1850), authorizing railroad corporations to perfect defective titles. *In re P. P. and C. I. R. R. Co.* 871

19. Under the provision of the act of 1873 (chap. 531, Laws of 1873), authorizing the G. and C. I. R. R. Co. to construct its road and lay its track upon Gravesend avenue, said company is excused from complying with the prerequisites to proceedings to acquire title to lands prescribed by the general railroad act; *i. e.*, the making and filing of a map or profile of its route; the giving of notice of such proceedings to actual occupants, and notice to the highway commissioners; and also from making an application to and obtaining an order of the Supreme Court as required by the act of 1854. (Chap. 582, Laws of 1854.) *Id.*

20. So far as said act is valid, and so far as its valid provisions are inconsistent with the general railroad acts, it is a special charter for

said corporation; and so far exempts the corporation from the force of those laws. Where it is not in conflict, the corporation is bound by, and may avail itself of the privileges given by, said laws; among others, the privilege of perfecting a defective title. *Id.*

21. Although a highway is devoted to one public use, the legislature may, by special enactment, devote it, concurrently, to another public use, so far as declaring a necessity for that other use is concerned. *Id.*

22. Where power is given by statute to one railroad corporation to consolidate with any other, whatever other corporation it selects for a union, and finds willing to join it, has power to unite with it, although such other corporation is not named in the statute. *Id.*

23. The provision of the general railroad act (§ 18), making it a prerequisite to proceedings *in invitum* to acquire title to lands that the company shall be "unable to agree for the purchase," does not mean an impossibility to purchase at any price, however large, but that the owner must be either unwilling to sell at all, or only willing to sell at a price which, in the judgment of the agents of the corporation, is excessive. *Id.*

24. An amendment of the petition of a railroad corporation, in proceedings to acquire title to lands, so as to ask for a less quantity of land, made upon the hearing at Special Term, does not make necessary a further attempt at agreement on a price, at least, where the owners are represented in court, and no suggestion is made in their behalf of a withdrawal of opposition, or for a suspension of proceedings with a view to such an attempt. *Id.*

25. The said act of 1873 is not amenable to the constitutional objection (Const., art. 3, § 16) that it embraces more than one subject. The title to the act is expressive of the subject, which is to open certain lands for public use, and the

different provisions are but the details of that subject. *Id.*

26. So, also, the act of 1874 (chap. 448, Laws of 1874), entitled "An act for the relief of Park Avenue Railroad Company, in the city of Brooklyn, and to authorize the extension of its tracks through certain streets and avenues in said city," expresses the subject sufficiently for the purposes of said constitutional provision. The subject, *i. e.*, the relief of the company, necessarily includes provisions removing restrictions upon its powers, and giving it greater powers. *Id.*

27. The constitutional provision (art. 8, § 1) in reference to the formation of corporations does not render a special charter, or a special addition to a charter taken under a general law, unconstitutional. *Id.*

28. Where proceedings are instituted by a railroad corporation to condemn various pieces of land belonging to different owners, all being described in one petition, and the case as to all is heard together, although separate orders are entered as to each owner, there is but one proceeding, and all the orders may be reviewed upon one appeal; so, also, where the orders are affirmed at General Term, and separate orders of affirmance entered, costs for but one case are proper. *Id.*

29. The rule requiring persons before crossing a railroad track to look to see whether trains are approaching is not applied inflexibly in all cases, without regard to age or other circumstances. *McGovern v. N. Y. C. and H. R. R. Co.* 417

30. In an action to recover damages for the alleged negligent killing of W., plaintiff's intestate, a lad eight years old, it appeared that he was going northerly on the west side of a street, running north and south, in the city of R., on his way to school; said street was crossed by three tracks of defendant's road. The view of the track was obstructed so that a person so pass-

ing could not see an engine or train approaching from the west, on the south track, until he was within four feet of the track. As W. approached the track a freight train, with an engine at each end, each ringing a bell, was passing west on the middle track. As the rear of the train was crossing the street, W. started to go diagonally across the tracks, in the direction of his school, when he was struck and killed by an engine which was backing down on the south track. Defendant had a flagman at the crossing on the east side of the street. Plaintiff's evidence tended to show that the flagman did not wave his flag nor do any other act to warn W. of danger until at the moment of the accident; also that the engine was going at a speed of eight or ten miles an hour. Persons on the engine could not see the track to the east on account of the coal in the tender. It was shown that a backing engine could not be so easily stopped as one moving forward, and that when so moving an arrangement for discharging sand on the track, in front of the wheels, to check the engine, could not be applied. The crossing was a dangerous one; the street was traversed by many people, and each morning school children were accustomed to pass at this point. *Held*, that the case was properly submitted to the jury; that it was for them to say whether, under the circumstances, it was prudent to move an engine backward at such a rate of speed without taking other and additional precautions to protect passengers on the street; and that the jury were justified in finding negligence on the part of the flagman; also that the omission of the boy to look to the west before stopping upon the track was not under the circumstances, contributory negligence, as matter of law. *Id.*

31. A railroad corporation which has parted with the possession and control of its road under a lease thereof to another corporation, containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon the highway, from damages re-

sulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. *Ditchett v. S. D. and P. M. R. R. Co.* 425

82. The provision of the general railroad act, as amended in 1854 (chap. 282, Laws of 1854), imposing upon corporations formed under it the duty of erecting and maintaining fences on the sides of their roads, does not apply to fences for the protection of travelers upon a highway. *Id.*

83. As to whether the lessor of a railroad who has parted with possession can be held liable for the negligence of the lessee, under the statute in question, in a case where it does apply, *quære*. *Id.*

84. Where a street railroad car is so crowded that, although it may not be physically impossible for one taking passage to enter it, yet that he cannot do so without great and unreasonable discomfort to himself and to the prior occupants of the car, and the conductor consents to and does, accept from him the usual fare without insisting upon his finding a place within the car, and while riding upon the platform he is thrown off and injured by the negligence of the company or its employes, the fact that he was standing upon the platform does not of itself constitute contributory negligence; but it is a question for the jury. *Ginna v. Second Ave. R. R. Co.* 596

85. So, also, it is not negligence *per se* for one riding upon the platform of the car to omit to take hold of the iron bar or rail to prevent being thrown from the platform. *Id.*

— *When chargeable as warehouseman.*

*Fairfax v. N. Y. C. R. R. Co.* 11

— *Sufficiency of negligence of.*

*Weber v. N. Y. C. R. R. Co. (Mem.)* 587

— *When improper submission to jury of question of negligence is a fatal error.*

*Booth v. B. and A. R. R. Co. (Mem.)* 593

## RECEIVER.

— *Manufacturing corporation may continue action brought by it to recover unpaid subscriptions to stock.* *P. W. Co. v. Badger.* 294

## RECOGNIZANCE.

Defendant R., having been arrested on a charge of abandoning his family, gave, with defendant, S., as his surety, a recognizance for his appearance before the justice on a day specified, "and from time to time as directed by the said justice." In an action upon the recognizance, it appeared that, after several adjournments, R. did not appear upon two days to which the proceedings were adjourned, and the justice ordered the recognizance forfeited. *Held*, that the evidence did not show a breach of the condition; that R. was not required thereby to appear upon any and every adjourned day, but only when directed by the justice; that there could be no continuance of the liability after the day named, if it was capable of being continued at all, but by a proper order of the justice directing the principal to appear at a specified time; that no such order could be implied from the mere adjournment, and in the absence of proof thereof defendants were not liable. *People v. Scott.* 585

## RECORDING ACT.

1. P. and wife executed a mortgage upon premises of which the former had possession under a contract of sale, which mortgage was duly recorded. P. thereafter received a deed, which was recorded; the mortgage was assigned to plaintiff's testator. P. subsequently sold and conveyed the premises, receiving from the grantee a mortgage for a part of the purchase-money, which was duly recorded; the grantee had notice of the prior mortgage. P. assigned his mortgage to defendant T., assuring him that the mortgage was the first lien. T.

searched the records back to the deed to P. In an action to foreclose the first mortgage, T. claimed that his mortgage was entitled to priority. *Held*, untenable; that as P. would be estopped from claiming priority if he had retained the mortgage, his assignee had no superior right and was also estopped; and that the fact that the records showed a perfect chain of title sustaining T.'s mortgage gave it no precedence. *Orans v. Turner*. 437

2. The only effect of recording an assignment of a mortgage is to protect the assignee against a subsequent sale by the mortgagee of the same mortgage. *Id.*

#### REFORMATION OF CONTRACT.

1. Where the complaint in an action upon a policy of fire insurance, sets forth facts showing that the parties were mistaken as to the effect of the language used, the averments are sufficient to authorize a reformation of the contract, although there is no direct allegation of a mistake of fact. *Maher v. Hib. Ins. Co.* 283
2. Although a party insured accepts a policy with knowledge of the language used in describing the property insured, if, at the time, he points out a mistake therein, but is prevented from having the same corrected, or is thrown off his guard and dissuaded therefrom, by the acts or declarations of the insurer, he may show the mistake in an action on the policy; and the insurer is estopped from setting up the letter of the contract in bar of the action, and from claiming that the situation of the property does not agree therewith. *Id.*
3. Where the parties to a contract, through a misconception as to the meaning and effect of terms when used in such a contract, use terms which failing to express their intention, do express a meaning different from that intended, proof of the facts will make a case for a reformation of the contract; and this, although they knew what words were employed and their ordinary meaning. *Id.*
4. A policy of fire insurance upon plaintiff's building, described it as "occupied as a dwelling." A portion of the lower story was occupied as a grocery, and the residue of the house as a dwelling. In an action upon the policy it was alleged and evidence was given and received under objection on the trial, showing that plaintiff and the local agent of the insurer, who filled out and issued the policy, knew at the time how the house was occupied; that they both intended to insure it, as it was actually occupied, and both thought the terms used in the description in the policy would properly designate the occupation; that plaintiff, doubting whether the intention had been well carried out, called the attention of the agent to the erroneous description, and was assured by him that it made no difference, that the words used were apt and ample to express their meaning and intention; also, that the secretary and general agent of the insurer, with knowledge of the description in the policy, inspected in person the property insured and pronounced the risk a good one. No express allegation of a mistake was contained in the complaint. *Held*, that the evidence was properly received and was sufficient to authorize a reformation of the contract, which was proper under the pleadings. *Id.*
5. Also, *held*, that a reformation of the policy did not render nugatory, or affect the proofs of loss furnished. *Id.*
6. The judgment was simply for the amount of loss, without in express terms adjudicating a reformation of the policy. *Held*, immaterial. *Id.*

#### REHEARING.

1. Where a record on appeal to this court shows no error the court has



no power to grant a new trial or rehearing. *In re Peugnet*. 442

2. A rehearing upon a motion or summary application can only be granted on reversal of an order. *Id.*

#### REMEDY.

Where a judgment against the accused in a criminal action is reversed by the General Term upon writ of error, solely upon the ground of an irregularity therein, and in the sentence; and the proceedings are remitted to the trial court to pronounce a proper sentence and judgment, error will not lie to this court at the suit of the plaintiff in error below. He must await a final judgment, and for errors other than that upon which he succeeded he must seek his remedy, if any, by another writ of error. *Pratt v. People*. 606

#### REMOVAL OF CAUSE.

1. A defendant may raise by answer the question of a loss of jurisdiction by a State court, by reason of proceedings taken under the laws of the United States for a removal of the cause to the federal courts, and upon proof of proceedings, taken regularly and in strict accordance with said laws, he is entitled to judgment adjudging all subsequent proceedings in the State court void. *Shaft v. Phoenix Ins. Co.* 544
2. By the proceedings for removal, the State court is, *ipso facto*, ousted of jurisdiction, whether an order of removal has been granted or denied by it. *Id.*
3. Where process for the commencement of an action in a State court against a foreign insurance corporation, doing business in the State, has been served upon it in the manner prescribed by the insurance laws of the State, and the attorney who appears for it in the State court, at the time of entering an appearance, files a petition and moves for a removal of the

cause, the defendant is bound by the acts of the attorney, and the petition and filing are its acts. *Id.*

4. A verification of the petition by the general and managing agent of the corporation in this State is sufficient; and averments in the verifying affidavit may be relied upon to show that the affiant has authority and means of knowledge. *Id.*
5. An affidavit verifying the petition, procured and presented by the attorney for the defendant, and made by one who, having official relations with it, has means of knowledge, is a sufficient verification. *Id.*
6. As to whether, under the statutes of the United States (R. S., U. S., 118, § 639), the verification of a petition for the removal of an action against a citizen of another State is requisite, *quære*. *Id.*

#### RESCISSION.

— *When transfer by vendee does not impair right to rescind purchase.*  
*Wooder v. Sage*. 68

#### ROCHESTER (CITY OF).

1. The provision of the charter of the city of Rochester of 1861 (chap. 143, Laws of 1861), providing that property which is exempted from taxation by the general laws of the State may be assessed and taxed for local improvements, includes lands of the State, and removed, as far as such lands situate in said city are concerned, any exemption then existing by statute or otherwise. *Hasan v. City of Rochester*. 529
2. Under the provisions of said charter the common council of the city, by ordinance, ordered one tier of lots on each side of Oak street, within certain limits, to be assessed for a local improvement. The assessors omitted certain lots belonging to the State within the prescribed limits, and imposed the

whole assessment upon the owners of other lots. In an action, by said owners, to restrain the collection of the assessment, *held*, that the assessment was illegal and void, and the action was maintainable; that the assessors, in failing to comply with the ordinance and requirements of the statute, did not act judicially; and that their decision could be reviewed collaterally. *Id.*

3. In the absence of proof it will not be assumed in such case that plaintiffs' taxes will only be increased to an amount so trifling that the court will not interfere; the presumption is the other way. *Id.*

4. Plaintiffs were not bound to offer to pay their proportion of the assessment. *Id.*

5. Nor was it necessary to prove on the trial that the property omitted was benefited by the improvement. The common council, in passing the ordinance prescribing the territory to be assessed, adjudged that all parts thereof were benefited, and bound the assessors to assume that the lands omitted derived some benefit; and on that assumption it should have been assessed. *Id.*

6. A confirmation of the assessment by the common council, after notice, did not preclude plaintiffs from the equitable relief sought. The provisions of the charter relating to the confirmation of assessments (§§ 197-199) vest no authority in the common council to confirm an assessment made in violation of an ordinance. *Id.*

### SALARY.

1. The provision of the act of 1870 making "further provision for the government of the city of New York" (chap. 383, Laws of 1870), vesting in the comptroller of the city the power to fix the salary of the corporation counsel at a sum not exceeding the salary of the recorder, did not repeal the provision of the act of 1854 (§ 1,

chap. 123, Laws of 1854), giving to said counsel an annual compensation for his services in street opening cases, to be assessed upon the lands benefited. *O'Gorman v. Mayor, etc.* 486

2. Nor was the said provision repealed by the provisions of the city charter of 1867 (chap. 446, Laws of 1867), or of the charter of 1870 (chap. 187, Laws of 1870), enumerating, among other duties of the corporation counsel, that of conducting the legal proceedings in opening streets, etc., and prescribing the mode of fixing his salary. *Id.*

3. Although, as a general rule, where a statute prescribes the duties to be performed by an officer and the mode of fixing his salary, the necessary implication is that the salary so fixed is intended as a full compensation for all the prescribed duties, and supersedes all previous statutory enactments making special compensation for any of them. It does not apply where there are special enactments showing that it was intended that the officer should receive compensation for certain services in addition to his salary and payable ultimately from a different source. *Id.*

— *Of clerks of District Courts in New York city cannot be fixed by board of apportionment.*

*See Whetmore v. Mayor, etc.* 21

— *Of the commissioner of jurors of New York.*

*See Taylor v. Mayor, etc.* 87

### SALES.

— *Warranty on.*

*See Bruce v. Burr, 237.*

### SHERIFF.

1. A sheriff having several executions in his hands, issued upon judgments rendered in counties outside the judicial district in which he resides, may make a motion in his own county for direc-

- tions as to the disposition of moneys collected by him, by levy and sale under the executions. *Phillips v. Wheeler*. 104
2. The provision of the Code (sub. 4, § 401), providing that motions must be made in the district in which the action is triable, or in an adjoining county, etc., refers to motions in an action while it is pending, or such as relate in some way to its pendency or procedure. *Id.*
  3. Prior to the making of such a motion the sheriff had commenced an action against all the execution creditors, to determine their respective rights; some of the defendants answered, one demurred on the ground that the complaint did not state facts constituting a cause of action; the demurrer was sustained by the General Term. The action was pending at the time of making the motion. *Held*, that this was no bar to the motion; that it was at least a matter of discretion with the court, whether or not to grant relief on the motion during the pendency of the action. *Id.*
  4. The provision of the "act to reduce the number of town officers," etc. (§ 26, chap. 180, Laws of 1845, as amended by § 13, chap. 455, Laws of 1847), providing for the payment of the fees of magistrates and other officers for certain criminal proceedings by the towns or cities where the offence was committed, does not embrace the fees of a sheriff as jailer or otherwise. It was intended only to apply to the fees of local officers in preliminary criminal proceedings in cases under the grade of felony; not to affect the liability of a county for services of county officers after commitment, either for trial or upon sentence. *People ex rel. v. Supra. Col. Co.* 330
  5. The accounts of a sheriff for receiving prisoners into and discharging them from jail, and for their board while confined therein, are properly county charges. (Tit. 1, art. 1, § 8, chap. 460, Laws of 1847; 1 R. S., 885, § 3.) *Id.*
  6. The liability of a county extends not only to such official services in cases strictly criminal, but includes also *quasi*-criminal offences, such as violation of city ordinances, the only distinction being that, in the latter case, instead of the statutory fee, the board of supervisors have power to fix the compensation. *Id.*
  7. Accordingly *held*, that the granting of a writ of *mandamus* was proper to compel a board of supervisors to audit the accounts of the county sheriff, as jailer, for receiving, discharging and boarding prisoners committed by the officers of a city for misdemeanors and violations of city ordinances. *Id.*
- ### SHIPPING.
1. The rule of mercantile law making the master of a vessel liable for the negligent acts of those under his authority, to the same extent as if he was the owner, applies without regard to the question whether the officers or men were employed by himself or the owners. *Kennedy v. Ryell*. 373.
  2. The authority given to the health officer of the port of New York by the statute (chap. 375, Laws of 1850) to take charge of a vessel subject to quarantine, and to control and direct, so far as necessary for quarantine purposes, the master and other employes thereon, is but temporary and specific; and the officers and men employed upon the vessel are not in any sense his agents or servants after his duties on board the vessel are performed and he has left it; it devolves upon the master to see that the vessel is restored to a proper condition for the comfort and safety of passengers. *Id.*
  3. Defendant was in command of a steamship at quarantine, which was directed to be fumigated by the deputy health officer of the port of New York; by whose order, the chief steward cleared the passengers from the steerage, and utensils containing some

poisonous substance were placed therein for the purpose of fumigation. The health officer gave instructions as to the length of time the steerage should remain closed, and as to the removal of the vessels; one of these, an ordinary drinking cup, was not removed with the others, and plaintiff's intestate, a child four years and nine months old, who, with his mother, had been ordered by the steward to return to the steerage cabin, drank some of the poison in the cup, and died from the effects thereof. In an action to recover damages, *held*, that it was within the line of the defendant's duty to see that the poison was removed; and for his negligence, or the negligence of his subordinates, in omitting to discharge this duty, he was liable.

*Id.*

4. Also *held*, that, as the mother of the deceased had been directed to return to the cabin, she had the right to infer that every thing was safe, and that no extraordinary diligence on her part was required for the protection of her child,

*Id.*

#### SPECIFIC PERFORMANCE.

1. Plaintiff and defendant entered into a verbal agreement to purchase and improve real estate on joint account, sharing equally the profits and losses. Under this arrangement two farms were purchased, which were conveyed to the parties jointly. A third farm was contracted for by their agent in his own name, but defendant, without the knowledge or consent of plaintiff, procured an assignment of the contract and a conveyance of the farm to himself. The parties made permanent improvements from time to time at their joint expense upon, and purchased cattle and other property for, all and each of the farms. All three were treated alike, and plaintiff, with the knowledge of defendant, directed about work and improvements upon the last one purchased and made payments therefor, he and defendant

visiting it together, talking in reference to disposing of the personal property thereon and of an interest therein, without any intimation on the part of defendant that plaintiff was not a joint owner with him. Plaintiff advanced money from time to time on account of all the purchases without distinction. In an action to compel defendant to convey an undivided interest in said farm to plaintiff, *held*, that the agreement was not within the statute of frauds, but was valid as forming a partnership for the purchase of lands; that the farm in question was included in the agreement, and the defendant, having taken title in fraud of plaintiff's right, a resulting trust arose in favor of the latter; that it was not necessary for plaintiff to resort to an action to dissolve the partnership and for an accounting, but that plaintiff was entitled to the relief sought. *Traphagen v. Burt.* 80

2. After discovery by plaintiff of the fact that the farm was conveyed to defendant, the parties entered into an agreement that plaintiff should convey to defendant his interest in one of the other farms, and in the personal property thereon, defendant agreeing among other things, to convey to plaintiff an undivided one-half interest in the farm in question. The agreement was fully executed save in respect to such conveyance, which defendant refused to execute. *Held*, that aside from the question of the copartnership, plaintiff was entitled to and could enforce a specific performance in this particular. *Id.*

#### STATE.

1. The legislature has power to authorize the lands of the State to be assessed for local improvements. *State v. City of Rochester.* 528
2. The provision of the Revised Statutes (1 R. S., 387, § 1) exempting from taxation lands belonging to the State relates to general, county and State taxes;

it has no reference to assessments for improvements made under special laws and of a local character. *Id.*

### STATUTES.

1. The amendment of a statute, by declaring that the same shall read as prescribed by the amendatory act, is not a repeal of the original statute; but from the time of the passage of the amendatory act, the whole force of the enactment, as to subsequent transactions, rests upon it. The former statute is merged in it, has no vitality distinct from it, and can only be referred to as to past transactions. A repeal, therefore, of the amendatory act does not revive the original act, but both fall together. *People ex rel. v. Suprs. Mont. Co.* 109
2. Accordingly, *held*, that the act of 1874 (chap. 180, Laws of 1874), repealing the act of 1873 (chap. 525, Laws of 1873), which amended the act of 1867 (chap. 664, Laws of 1867), enabling the supervisors of Montgomery county to refund illegal taxes, did not restore the act of 1867, but both were abrogated. *Id.*
3. Where the legislature makes an appropriation of money, and directs the same to be levied by tax, either general or local, for the satisfaction of a claim, which is not a public charge, or recoverable by action, but is only founded on justice and equity, it vests no absolute right in the claimant; and when no condition is imposed upon him, and nothing is done or required to be done by him as a consideration for the concession, there is nothing which gives the enactment the form or sanction of a contract, and so protected by the Constitution. Until, therefore, the money is raised and actually paid over, the whole subject is within the control of the legislature, and a repeal of the enactment is valid. *Id.*
4. As by the statutes so repealed, as above stated, the amount of a claim for a tax illegally assessed and paid, when determined by the board of supervisors, was made a county charge, and said board had no discretion to allow or disallow the same, or in determining whether they would or would not audit or adjust it, the functions of the board, judicial in their character, and so final and conclusive until reversed, were limited to ascertaining the amount. A repeal, therefore, of the act making the claim a county charge did not reverse any judicial determination by the board. *Id.*
5. Accordingly, *held*, where, prior to the passage of the repealing act, a claim had been presented to the board of supervisors, and the amount thereof fixed and determined by it, but the same had not been collected and paid, that the action of the board did not add to the force or effect of the statutes, or make them irrepealable, and that, by the repeal, all of the proceedings of the board fell with them. *Id.*
6. Although, as a general rule, where a statute prescribes the duties to be performed by an officer and the mode of fixing his salary, the necessary implication is that the salary so fixed is intended as a full compensation for all the prescribed duties, and supersedes all previous statutory enactments making special compensation for any of them. It does not apply where there are special enactments showing that it was intended that the officer should receive compensation for certain services in addition to his salary and payable ultimately from a different source. *O'Gorman v. Mayor, etc.* 487

— 2 R. S., 665, § 27.

*See Tully v. People*, 15.

— Chap. 385, Laws of 1873.

— Chap. 438, Laws of 1872.

*See Whitmore v. The Mayor*, 21.

— Chap. 336, Laws of 1872.

*See Wallack v. The Society, etc.*, 23

— Chap. 555, Laws of 1864.

*See Wait v. Ray*, 36.

— 1 R. S., 602.

— 1 R. S., 517, § 81.

*See Miller v. Griswold*, 59.

— *Chap. 86, Rev. Laws 1818.*  
*See Fisher v. The Mayor, 73.*  
 — *Chap. 875, Laws of 1869.*  
 — *Chap. 576, Laws of 1855.*  
 — *Chap. 367, Laws of 1872.*  
 — *Chap. 385, Laws of 1878.*  
 — 1 R. S., 117, § 9.  
*See Taylor v. The Mayor, 88.*  
 — *Chap. 486, Laws of 1871.*  
*See In re Beggs, 180.*  
 — 1 R. S., 520, § 99.  
 — *Chap. 311, Laws of 1861.*  
*See Bridge v. Wyckoff, 130.*  
 — *Chap. 669, Laws of 1872.*  
*See Collins v. Drow, 149.*  
 — *Chap. 141, Laws of 1850.*  
 — *Chap. 282, Laws of 1854.*  
*See Spinner v. N. Y. C. and H. R. R. Co., 153.*  
 — 2 R. S., 406, § 78.  
*See Edington v. M. L. Ins. Co., 185.*  
 — *Chap. 322, Laws of 1874.*  
 — *Chap. 600, Laws of 1874.*  
*See Produce Bk. v. Morton, 199.*  
 — *Chap. 412, Laws of 1854.*  
 — *Chap. 558, Laws of 1869.*  
*See Roddourn v. S. L. G. and W. Co., 215.*  
 — *Chap. 475, Laws of 1872.*  
 — *Chap. 427, Laws of 1878.*  
*See Thomas v. People, 218.*  
 — 2 R. S., 194, § 170.  
*See In re Price, 231.*  
 — *Chap. 140, Laws of 1850.*  
 — *Chap. 253, Laws of 1854.*  
*See In re R. and C. R. R. Co., 242.*  
 — *Chap. 500, Laws of 1863.*  
*See Schuyler v. Hayward, 253.*  
 — 1 R. S., 728, § 52.  
*See Estes v. Wilcox, 264.*  
 — *Chap. 322, Laws of 1874.*  
*See Pennie v. C. L. Ins. Co., 276.*  
 — *Chap. 322, Laws of 1874.*  
*See Wheeler v. Scofield, 311.*  
 — *Chap. 180, Laws of 1845.*  
 — *Chap. 455, Laws of 1847.*  
 — *Chap. 460, Laws of 1847.*  
 — 1 R. S., 385, § 8.  
*See People ex rel. Van Tassel v. Supervisors, 320.*  
 — *Chap. 140, Laws of 1850.*  
 — *Chap. 531, Laws of 1878.*  
 — *Chap. 582, Laws of 1854.*  
 — *Chap. 448, Laws of 1874.*  
*See In re P. P., etc., R. R. Co., 371.*  
 — *Chap. 275, Laws of 1850.*  
*See Kennedy v. Ryall, 379.*  
 — 1 R. S., 742, § 19.  
*See Kyle v. Kyle, 400.*  
 — 2 R. S., 63, § 40.  
 — *Chap. 450, Laws of 1847.*

— *Chap. 256, Laws of 1849.*  
*See Sisters of Charity v. Kelly, 410.*  
 — *Chap. 282, Laws of 1854.*  
*See Ditchett v. S. D. and P. M. R. Co., 425.*  
 — *Chap. 580, Laws of 1872.*  
 — *Chap. 813, Laws of 1874.*  
*See In re Peugnet, 441.*  
 — *Chap. 322, Laws of 1874.*  
*See Roosevelt v. Linkert, 447.*  
 — *Chap. 335, Laws of 1878.*  
*See Davenport v. The Mayor, 456.*  
 — *Chap. 335, Laws of 1878.*  
*See People ex rel. v. Police Comrs., 475.*  
 — *Chap. 388, Laws of 1870.*  
 — *Chap. 122, Laws of 1854.*  
 — *Chap. 448, Laws of 1857.*  
 — *Chap. 187, Laws of 1870.*  
*See O'Gorman v. The Mayor, 486.*  
 — *Chap. 463, Laws of 1853.*  
 — *Chap. 800, Laws of 1862.*  
 — *Chap. 334, Laws of 1861.*  
 — *Chap. 617, Laws of 1873.*  
*See People ex rel. v. McCann, 506.*  
 — 1 R. S., 206, § 67.  
*See People ex rel. v. Colgate, 512.*  
 — *Chap. 761, Laws of 1866.*  
 — *Chap. 97, Laws of 1865.*  
*See People ex rel. v. Comrs., 516.*  
 — *Chap. 217, Laws of 1866.*  
 — *Chap. 514, Laws of 1857.*  
 — *Chap. 344, Laws of 1857.*  
 — *Chap. 438, Laws of 1872.*  
*See People ex rel. v. Leask, 521.*  
 — 1 R. S., 387, § 1.  
 — *Chap. 143, Laws of 1861.*  
*See Hassan v. City of R., 528.*  
 — 2 R. S., 189.  
*See Packer v. Nevins, 550.*  
 — *Chap. 338, Laws of 1858.*  
*See In re Moore, 555.*  
 — *Chap. 445, Laws of 1876.*  
*See People ex rel. v. Banks, 568.*  
 — *Chap. 811, Laws of 1868.*  
 — *Chap. 241, Laws of 1869.*  
*See People ex rel. v. Phillips, 582.*

## STATUTE OF FRAUDS.

Plaintiff contracted, by parol, to sell, and defendant to purchase, 1,000 cords of wood, or so much thereof as plaintiff could cut and deliver, at a specified price per cord; no time for performance was fixed. Plaintiff delivered, and received pay for, about 322 cords, and had about 200 cords more ready for delivery; this he commenced to draw, and had

piled nineteen cords by the side of defendant's road, when he was notified not to bring more, that defendant did not want it; and it refused to pay for the nineteen cords. In an action to recover damages, *held*, that the partial delivery and acceptance answered the requirements of the statute of frauds, and validated the contract; that the contract was not one that could not be performed within a year; also, that the contract was not so indefinite as to be void. *Van Woert v. A. and S. R. Co.* 538

— *Parol agreement forming partnership for purchase of lands not void under.*

*See Traphagen v. Burt.* 80

— *When parol warranty not invalidated by.*

*See Bruce v. Burr.* 237

#### STATUTE OF LIMITATIONS.

1. Under the provisions of the act of 1818, "to reduce several acts relating particularly to the city of New York to one act" (§ 83, chap. 86, Revised Laws of 1813), the omission of the city corporation to pay an award for land taken for widening a street, within four months after confirmation of the report of the commissioners of estimate and assessment, does not alone give a right of action for its recovery; there must be, in addition, an application to the city for payment after the expiration of the four months, by the party entitled thereto. *Fisher v. Mayor, etc.* 73

2. The statute of limitations, therefore, does not commence to run against such a cause of action until application is so made. *Id.*

#### STEAMBOATS.

— *Liability of master of.*  
*See Kennedy v. Ryall.* 378

#### STIPULATION.

1. R., defendant's testator, guaranteed the payment of rent by lessees of plaintiffs' testator. By

the terms of the lease the rent was to be paid in quarterly installments. Two installments falling due May and August, 1874, not having been paid, plaintiffs brought separate actions therefor against the lessees, perfected judgments upon inquests October 6, 1874, and immediately issued executions. Thereafter, on the same day, an order was obtained and served staying plaintiffs' proceedings on the judgments for the purposes of a motion to open the defaults. Upon the motion an order was made allowing defendants to defend, the judgments and executions, however, to stand as security. A stipulation was then entered into between plaintiffs' attorney and the lessees, that the executions should be countermanded and all proceedings on one of the judgments stayed until November 25, 1874, and on the other until January 10, 1875, when the lessees promised to pay the same, with all sheriff's fees, plaintiffs being authorized to collect rents from sub-tenants and apply in payment of the judgments. In an action upon the guaranty, *held*, that, assuming the judgments to be valid (and they must be so regarded after the stipulation by which any defence was waived), the stipulation operated to postpone the payment of the rents so as to prevent their collection in any form until the days specified; that the agreement to extend the time was for a good consideration; and that the surety was thereby discharged. *Ducker v. Rapp.* 464

2. It was also provided in the stipulation that, in case legal proceedings were commenced to collect the rent due November 1, 1874, the time for defendants to answer should be extended until February 5, 1875. *Held*, that thereby plaintiffs put it out of their power to procure a judgment for over ninety days after the rent accrued; that the provision would have bound the surety in case he had paid the rent; that the intent was to postpone payment and that the surety was discharged from the payment of this installment. *Id.*

8. Plaintiffs sued to recover the rent as executors; they should have claimed as trustees. *Held*, that the same persons being entitled to recover, although in a different capacity, the manner of commencing the actions did not impair the validity of the agreement. *Id.*
  4. It was objected that plaintiffs' attorneys had no authority to make the stipulation. It appeared that one of the plaintiffs was present and consented thereto. *Held*, that it was to be presumed that the attorneys were employed to collect the rents under the will of the testator, and their mistake in attempting to recover in the name of plaintiffs as executors instead of as trustees did not impair the acts within the scope of their authority, and that the presence and assent of one of the plaintiffs rendered it unnecessary to consider the extent of their authority. *Id.*
  5. *It seems*, that the withdrawal of the executions did not of itself, under the circumstances, operate to discharge the surety *pro tanto*. *Id.*
  6. Also *held*, that the stipulation did not impair the obligation of the surety as to other installments than those specified. *Id.*
- *To try cause without pleadings binding.*  
*See Cook v. Allen (Mem.)* 578

## STOCKHOLDER.

1. Plaintiff's testator, M., was a stockholder in a Vermont mining corporation. Its directors imposed an assessment upon its stock and advertised the stock of M. for sale for non-payment thereof. Prior to the sale M. tendered to the president of the corporation, at its office, during business hours, his check for the amount of the assessment. The president refused to accept, but made no objection as to form or amount. The stock was sold and bought in by the president. M. repeatedly thereafter offered to the corporation and to its president the amount of the assessment, and all charges and expenses in making the sale. In an action brought to set aside the sale and to restrain a transfer of the stock to the purchaser, *held*, that in the absence of evidence of want of authority in the president the tender must be assumed to have been properly made to him; that the question of want of authority not having been raised upon the trial, could not be raised upon appeal; that no objections as to the form or amount of the tender having been made at the time, they were waived and the tender must be held sufficient; that a sufficient tender having been made, the sale was without authority and void, and the plaintiff was entitled to the equitable relief claimed. *Mitchell v. Vt. C. M. Co.* 280
2. In an action to recover an unpaid balance of a subscription to the capital stock of a manufacturing corporation, where it appears that defendant subscribed for the stock, acted as a trustee of the corporation, took part in its management and contracted with it as a corporation, he cannot dispute the validity of the incorporation. *Phœnix W. Co. v. Badger.* 294
3. A subscription to the articles of incorporation, with a statement of the number of shares opposite the name, is a sufficient and binding subscription for the stock, and takes effect upon the filing of the certificate. *Id.*
4. An action may be brought upon the original subscription; it is not necessary to aver calls, at least after the lapse of two years from the time of incorporation. *Id.*
5. Such an action brought by the corporation, may be continued by a receiver subsequently appointed in the name of the original party. *Id.*
6. An abandonment of its business by the corporation, either before or after the commencement of the action, is no defence where it appears that the incorporation is indebted to more than the amount



of the subscription, as the action is prosecuted for the benefit of creditors. *Id.*

7. An objection that other subscribers who have not paid should have been made parties, is not available on appeal where the objection was not raised by answer, and where there were no findings or requests to find in reference thereto, or exceptions raising the point. *Id.*

8. The refusal of a referee in such an action to allow an amendment of the answer setting up that the signature of another apparent subscriber was not genuine, and that defendant was misled thereby, is not the proper subject of exception; if the referee has power to allow the amendment, it is matter of discretion. *Id.*

9. Subsequent to defendant's subscription an arrangement was made, with the approval of the corporation, that defendant should transfer a portion of his stock to E., the latter delivering to the corporation his notes therefor, indorsed by defendant, the stock to be transferred when the notes were paid. Notes were so given, which were renewed from time to time. One of the renewals was transferred by the corporation to P. as collateral security. P. returned it to the corporation, and with his consent it was produced and offered for cancellation on the trial. *Held*, that defendant was not entitled to have the amount thereof deducted from the amount due on his subscription. *Id.*

#### SUBSTITUTION OF PARTIES.

Where a motion was made to substitute the personal representatives of a surety, against whom and his principal a joint judgment had been obtained, as defendant in his stead, he having died after affirmance by the General Term, and during the pendency of an appeal to this court, upon which appeal an undertaking had been given staying execution, *held*, that the motion must be denied;

that there could be no propriety in the substitution, as the judgment could never be enforced or properly affirmed; that the appeal could not be continued simply for the purpose of enabling the plaintiff, in case of affirmance, to bring an action upon the undertaking, as there could be no liability upon the undertaking after the judgment had been discharged, either by act of the parties or operation of law. *Risley v. Brown.* 160

#### SUPERVISOR.

1. A board of supervisors has authority to direct the purchase of such articles of furniture as are necessary to properly equip and furnish the county jail; and an account for articles so purchased is a proper county charge. *Schenck v. Mayor, etc.* 44

2. The supervisors of the county of New York have the same power as to furnishing what is known and recognized by law as the county jail, *i. e.*, "the Ludlow street jail," although such jail may technically be the property of the city; and this is so, assuming that such jail cannot be used for the confinement of criminals sentenced by State courts, and that judgment debtors committed upon executions issued out of courts of record are absolutely bound to support themselves. *Id.*

3. Accordingly, *held*, that the act of 1874 (chap. 180, Laws of 1874), repealing the act of 1873 (chap. 525, Laws of 1873), which amended the act of 1867 (chap. 664, Laws of 1867), enabling the supervisors of Montgomery county to refund illegal taxes, did not restore the act of 1867, but both were abrogated. *People ex rel. v. Suprs. Mont. Co.* 109

4. As by the statutes so repealed, as above stated, the amount of a claim for a tax illegally assessed and paid, when determined by the board of supervisors, was made a county charge, and said board had no discretion to allow or disallow the same, or in de-

termining whether they would or would not audit or adjust it, the functions of the board, judicial in their character, and so final and conclusive until reversed, were limited to ascertaining the amount. A repeal, therefore, of the act making the claim a county charge did not reverse any judicial determination of the board. *Id.*

5. Accordingly, *held*, where, prior to the passage of the repealing act, a claim had been presented to the board of supervisors, and the amount thereof fixed and determined by it, but the same had not been collected and paid, that the action of the board did not add to the force or effect of the statutes, or make them irrevocable, and that, by the repeal, all of the proceedings of the board fell with them. *Id.*

6. The cases wherein the actions of boards of supervisors, in the settlement of disputed claims, or in the audit and allowance of county charges, are regarded as in their nature judicial, are where the whole matter is within their jurisdiction. *Id.*

7. The provision of the "act to reduce the number of town officers," etc. (§ 26, chap. 180, Law of 1845, as amended by § 13, chap. 455, Laws of 1847), providing for the payment of the fees of magistrates and other officers for certain criminal proceedings by the towns or cities where the offence was committed, does not embrace the fees of a sheriff as jailer or otherwise. It was intended only to apply to the fees of local officers in preliminary criminal proceedings in cases under the grade of felony; not to affect the liability of a county for services of county officers after commitment, either for trial or upon sentence. *People ex rel. v. Supra. Col. Co.* 830

8. The accounts of a sheriff for receiving prisoners into and discharging them from jail, and for their board while confined therein, are properly county charges. (Tit. 1, art. 1, § 8, chap. 460, Laws of 1847; 1 R. S., 885, § 8.) *Id.*

9. The liability of a county extends not only to such official services in cases strictly criminal, but includes also *quasi* criminal offences; such as violations of city ordinances, the only distinction being that, in the latter cases, instead of the statutory fee, the board of supervisors have power to fix the compensation. *Id.*

10. Accordingly, *held*, that the granting of a writ of *mandamus* was proper to compel a board of supervisors to audit the accounts of the county sheriff, as jailer, for receiving, discharging and boarding prisoners committed by the officers of a city for misdemeanors and violations of city ordinances. *Id.*

#### SUPERVISOR OF ELECTIONS (NEW YORK CITY).

— *Acceptance of that office a relinquishment of city office under New York charter.*

*See Davenport v. Mayor, etc.* 456

#### SURROGATE'S COURT.

1. In an action to recover damages for the alleged negligent killing of plaintiff's intestate, an infant, it appeared that, at the time of the accident, plaintiff, who was the father of the child, lived, and for seven months prior thereto had lived, in New York; he came from England, and his wife and child were coming to join and live with him. *Held*, that the evidence was sufficient to show *prima facie* that he was domiciled in New York; and so that his child was an inhabitant thereof; and that the surrogate of that county properly issued letters of administration to him. *Kennedy v. Ryall.* 380

2. Plaintiff testified that he came to New York for the purpose of making a home and a living there. This was stricken out on motion of defendant's counsel. *Held*, error; that the evidence was proper and material on the question of residence. *Id.*

- tions as to the disposition of moneys collected by him, by levy and sale under the executions. *Phillips v. Wheeler.* 104
2. The provision of the Code (sub. 4, § 401), providing that motions must be made in the district in which the action is triable, or in an adjoining county, etc., refers to motions in an action while it is pending, or such as relate in some way to its pendency or procedure. *Id.*
  3. Prior to the making of such a motion the sheriff had commenced an action against all the execution creditors, to determine their respective rights; some of the defendants answered, one demurred on the ground that the complaint did not state facts constituting a cause of action; the demurrer was sustained by the General Term. The action was pending at the time of making the motion. *Held*, that this was no bar to the motion; that it was at least a matter of discretion with the court, whether or not to grant relief on the motion during the pendency of the action. *Id.*
  4. The provision of the "act to reduce the number of town officers," etc. (§ 26, chap. 180, Laws of 1845, as amended by § 13, chap. 455, Laws of 1847), providing for the payment of the fees of magistrates and other officers for certain criminal proceedings by the towns or cities where the offence was committed, does not embrace the fees of a sheriff as jailer or otherwise. It was intended only to apply to the fees of local officers in preliminary criminal proceedings in cases under the grade of felony; not to affect the liability of a county for services of county officers after commitment, either for trial or upon sentence. *People ex rel. v. Supra. Col. Co.* 830
  5. The accounts of a sheriff for receiving prisoners into and discharging them from jail, and for their board while confined therein, are properly county charges. (Tit. 1, art. 1, § 8, chap. 460, Laws of 1847; 1 R. S., 385, § 3.) *Id.*
  6. The liability of a county extends not only to such official services in cases strictly criminal, but includes also quasi-criminal offences, such as violation of city ordinances, the only distinction being that, in the latter case, instead of the statutory fee, the board of supervisors have power to fix the compensation. *Id.*
  7. Accordingly *held*, that the granting of a writ of *mandamus* was proper to compel a board of supervisors to audit the accounts of the county sheriff, as jailer, for receiving, discharging and boarding prisoners committed by the officers of a city for misdemeanors and violations of city ordinances. *Id.*
- ### SHIPPING.
1. The rule of mercantile law making the master of a vessel liable for the negligent acts of those under his authority, to the same extent as if he was the owner, applies without regard to the question whether the officers or men were employed by himself or the owners. *Kennedy v. Ryall.* 879.
  2. The authority given to the health officer of the port of New York by the statute (chap. 275, Laws of 1850) to take charge of a vessel subject to quarantine, and to control and direct, so far as necessary for quarantine purposes, the master and other employes thereon, is but temporary and specific; and the officers and men employed upon the vessel are not in any sense his agents or servants after his duties on board the vessel are performed and he has left it; it devolves upon the master to see that the vessel is restored to a proper condition for the comfort and safety of passengers. *Id.*
  3. Defendant was in command of a steamship at quarantine, which was directed to be fumigated by the deputy health officer of the port of New York; by whose order, the chief steward cleared the passengers from the steerage, and utensils containing some

poisonous substance were placed therein for the purpose of fumigation. The health officer gave instructions as to the length of time the steerage should remain closed, and as to the removal of the vessels; one of these, an ordinary drinking cup, was not removed with the others, and plaintiff's intestate, a child four years and nine months old, who, with his mother, had been ordered by the steward to return to the steerage cabin, drank some of the poison in the cup, and died from the effects thereof. In an action to recover damages, *held*, that it was within the line of the defendant's duty to see that the poison was removed; and for his negligence, or the negligence of his subordinates, in omitting to discharge this duty, he was liable.

*Id.*

4. Also *held*, that, as the mother of the deceased had been directed to return to the cabin, she had the right to infer that every thing was safe, and that no extraordinary diligence on her part was required for the protection of her child.

*Id.*

#### SPECIFIC PERFORMANCE.

1. Plaintiff and defendant entered into a verbal agreement to purchase and improve real estate on joint account, sharing equally the profits and losses. Under this arrangement two farms were purchased, which were conveyed to the parties jointly. A third farm was contracted for by their agent in his own name, but defendant, without the knowledge or consent of plaintiff, procured an assignment of the contract and a conveyance of the farm to himself. The parties made permanent improvements from time to time at their joint expense upon, and purchased cattle and other property for, all and each of the farms. All three were treated alike, and plaintiff, with the knowledge of defendant, directed about work and improvements upon the last one purchased and made payments therefor, he and defendant

visiting it together, talking in reference to disposing of the personal property thereon and of an interest therein, without any intimation on the part of defendant that plaintiff was not a joint owner with him. Plaintiff advanced money from time to time on account of all the purchases without distinction. In an action to compel defendant to convey an undivided interest in said farm to plaintiff, *held*, that the agreement was not within the statute of frauds, but was valid as forming a partnership for the purchase of lands; that the farm in question was included in the agreement, and the defendant, having taken title in fraud of plaintiff's right, a resulting trust arose in favor of the latter; that it was not necessary for plaintiff to resort to an action to dissolve the partnership and for an accounting, but that plaintiff was entitled to the relief sought. *Traphagen v. Burt.* 80

2. After discovery by plaintiff of the fact that the farm was conveyed to defendant, the parties entered into an agreement that plaintiff should convey to defendant his interest in one of the other farms, and in the personal property thereon, defendant agreeing among other things, to convey to plaintiff an undivided one-half interest in the farm in question. The agreement was fully executed save in respect to such conveyance, which defendant refused to execute. *Held*, that aside from the question of the copartnership, plaintiff was entitled to and could enforce a specific performance in this particular. *Id.*

#### STATE.

1. The legislature has power to authorize the lands of the State to be assessed for local improvements. *State v. City of Rochester.* 528
2. The provision of the Revised Statutes (1 R. S., 387, § 1) exempting from taxation lands belonging to the State relates to general, county and State taxes;

7. Exceptions will not lie to the language of the judge in giving instructions to a jury, unless it is such as to convey a wrong impression, or to mislead as to the law of the case. *Ginna v. Second Ave. R. Co.* 596

— *Erroneous charge in action for damages from overflow of water improperly suffered to accumulate on defendant's premises.*

*See Jutte v. Hughes.* 266

— *Error in ruling, when not ground for appeal,*

*See Bennett v. Lye. M. Ins. Co.* 274

— *Sufficiency of charge on question of negligence.*

*See Weber v. N. Y. C. R. R. Co. (Mem.)* 587

### TRUSTS AND TRUSTEES.

A creditor at large cannot maintain an action to enforce a resulting trust, under the statute of uses and trusts (1 R. S., 728, § 52), in lands purchased and paid for by his debtor, and by direction of the debtor deeded to another; and this is so, although the debtor is dead, and died insolvent. *Estes v. Wilcox.* 264

— *When fraud creates resulting trust.*

*See Traphagen v. Burt.* 30

### UNDERTAKING.

Upon an appeal to this court from an order under subdivision 4 of section 11 of the Code, an undertaking is necessary. *Cowdin v. Teal.* 581

— *On appeal by one joint-maker of promissory note who signed as surety, discharged by his death.*

*See Risley v. Brown.* 160

— *On injunction, assessment of damages of.*

*See Pucker v. Nevins.* 550.

### USURY.

One R. agreed with the agent of defendants' testator A. for a loan

for sixty days upon certain forged railroad bonds. The agreement was for a loan of eighty-five per cent on the face of the bonds for sixty days at one and one-half per cent per month, with seven per cent rebate in case the loan was taken up before, R. having the privilege of taking it up at any time. After the terms of the loan were settled, the agent proposed that to avoid trouble the bonds should be sold to A. direct, he giving a contract to sell them back in sixty days for the amount of the loan and the sum agreed to be paid therefor. This form of the transaction was accordingly adopted, the bonds delivered, the money advanced and the contract signed and delivered on behalf of A. R. subsequently contracted to sell the bonds to plaintiff; the bonds were delivered by A.'s agent, who received the purchase-money, deducted the amount due A. and paid over the residue to R. In an action to recover back the purchase-money, *held*, that, whether the loan was usurious or not, A. had no title to the bonds, save as pledgee, the title remaining in R., who had the right to sell them and to require A. to deliver at any time on being paid the loan; that the question of usury was one between R. and A., which in no manner affected the rights of plaintiff; that defendants were not estopped from setting up the real transaction, because the form of a sale was resorted to to evade the usury laws; and that they were not responsible for the genuineness of the bonds. *Baker v. Arnot.* 449

### VENDOR AND PURCHASER

1. The provision of the mechanic's lien law for the city of New York of 1863 (§ 14, chap. 500, Laws of 1863), declaring that for the purposes of the act one who has sold lands "upon an executory contract of purchase contingent upon the erection of buildings thereon shall be deemed the owner, and the vendee the contractor," does not change the actual relation be-

tween the vendor and vendee, or vary their legal rights as to each other, or to third persons, except for the purposes of the lien authorized by it. *Schuyler v. Hayward.* 253

— *When vendor chargeable with fraud.*  
*See Wright v. Brown.* 1

# VERIFICATION.

— *Of petition to remove cause to United States Court necessity of, and when properly made by attorney or agent.*  
*Shaft v. P. M. L. Ins. Co.* 544

# WAIVER.

2. Where a vendee has been induced to purchase property by means of fraud on the part of the vendor, mere want of diligence in discovering the fraud, does not deprive the vendee of his right to rescind because thereof; he owes the fraudulent vendor no duty of active vigilance, and if he acts promptly after actual discovery of the fraud, he has a perfect right to rescind. *Baker v. Lever.* 304

3. *It seems* that, as a general rule, a delay to rescind, after discovery of the fraud, does not operate as a waiver of the right, or as a confirmation of the fraudulent contract. *Id.*

4. Defendant and plaintiff's testator, W., contracted for the sale, by the former to the latter, of a certain piece of land. The contract, after describing the land by metes and bounds, thus continues: "containing fifty-four fifteen-hundredths acres of land, be the same more or less, for the sum of three hundred and fifty dollars per acre," which W. agreed to pay. When the deed was executed, defendant claimed that the surveyor had made a mistake, that there was in fact fifty-six fifteen one-hundredths acres; the purchase-price for that quantity at the agreed price per acre was inserted as the consideration in the deed, and was paid by W. Following the description in the deed were the words, "containing fifty-six and fifteen one-hundredths acres of land, be the same more or less." There was, in fact, but forty-eight forty-seven one-hundredths acres in the piece. In an action to recover back the payment in excess of the purchase-price of the actual quantity, *held*, that taking the contract and deed together, it appeared that the sale was by the acre, not by the piece, and that plaintiff was entitled to recover. *Wilson v. Randall.* 383

1. Where a judgment has been affirmed by the General Term, with costs, an entry of judgment without including costs is regular; the respondent may waive costs, and, by entering up judgment upon the order of affirmance without inserting them, he does waive them. *Whitney v. Townsend.* 40

2. Where exceptions have been taken upon a trial it is, in general, erroneous to direct a verdict subject to the opinion of the court at General Term; but if the parties consent to such a disposition of the case, this is an abandonment or waiver of the exceptions, and they will be disregarded. *Byrnes v. City of Cohoes.* 204

— *Objections to form and amount of tender not made at time considered waived.*

*Mitchell v. V. C. M. Co.* 280

— *Of forfeiture from breach of conditions in deed, what is.*

*Cook v. Wardens, etc. (Mem.)* 594

# WARRANTY.

1. Defendants contracted to sell and deliver to plaintiff a quantity of books at stipulated prices, receiving in payment therefor the promissory note of L. Before and about the time of the delivery of the note, plaintiff stated to defendants that the note was good, and would be paid at maturity; that he would guarantee that the note would be paid, and that the maker was responsible. The note was not good,

was not paid at maturity, and the maker was not responsible. In an action for breach of the contract, in failing to deliver the books, it appeared that defendants made inquiries of others as to the responsibility of the maker, and received favorable answers, which they believed, and upon which they, to a certain extent, relied. Defendant B., who made the contract, testified that he relied upon plaintiff's statements. *Held*, that defendants' testimony was not contradicted by, or inconsistent with, the fact that he believed, from information derived from others, that the maker was responsible; that such belief would not prevent the enforcement of a warranty if made; and that the statements of the plaintiff constituted a warranty. *Bruce v. Burr.*

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2. Also *held*, that such a parol warranty was not invalidated by the statute of frauds. *Id.*

— *In policies of insurance.*

*See Flynn v. E. L. Ins. Co.* 500

— *In policy of life insurance materiality of fact warranted, cannot be considered.*

*See Borteau v. M. L. Ins. Co.* 595  
(Mem.)

#### WIDOW.

— *When not included in gift to next of kin in will.*

*See Murdock v. Ward.* 387

— *Right to damages for withholding dower.*

*See Kyle v. Kyle.* 400

#### WILLS.

1. H. devised certain real estate to his wife "to be used and enjoyed by her during her natural life, and from and immediately after her decease \* \* \* to be divided equally among" his children. By a codicil he authorized his wife to sell and convey his real estate, subject, however, to the approval of all his heirs surviving at the time of such sale. After the death of H., the widow, with the consent of the surviving heirs, sold

and conveyed said real estate, but, prior thereto, two judgments had been recovered and docketed against A., one of the children. Upon a case submitted to determine the validity of the title so conveyed, *held*, that upon the death of H. his children took a vested remainder in the lands so devised, subject to be defeated by a sale under the power given to the widow; that such power did not enlarge the widow's estate into a fee, nor was it the testator's intention to give to her the whole proceeds in case of sale; but that the parties should take the same interest therein as they had in the lands, she to have the income, and upon her death the principal to go to the children; that the judgments against A. became liens upon his interest, subject, however, to the power of sale; and that a *bona fide* sale gave to the purchaser a good title, free from such liens, they being transferred from the lands, and attaching to the interest of A. in the proceeds. *Ackerman v. Gorton.* 63

2. The will of C., after various specific devises in fee of portions of a farm conveyed to him by G., contained a devise of 100 acres of land to his grandson, A., and "the remainder of land" belonging to him, of the farm conveyed by G., he devised to the plaintiff. There remained of said farm, over and above the specific devises, about sixteen acres. By a codicil made a few days subsequent to the will, a life estate in said 100 acres was devised to the testator's wife. After the death of A. and the testator's widow, plaintiff brought ejectment for the 100 acres. *Held*, that, assuming the devise to A. was only of a life estate, the clause devising the "remainder of land" referred only to the residue of the farm not before devised or specified, and did not convey the remainder of estate in said 100 acres after the two successive life estates; and that, therefore, plaintiff had no title to the land in question. *Christie v. Hawley.* 133.
3. The will of I. appointed three executors and directed that one of

them should "receive a commission of six per cent upon all moneys collected by him." *Held*, that this did not entitle the executor to the commission on the entire proceeds of the estate, or upon all sums received by the executor; but only on collections, giving the word its ordinary meaning. *Ireland v. Corae*. 343

4. The will of P., after various specific legacies and devises, gave the residue of his estate, real and personal, to his executors, in trust, to pay the income and profits to two brothers and two sisters of the testator, in equal proportion, during their joint lives, and, after their "several deaths," to divide the said residuary estate equally among their children. The provision closed thus: "In case either of my said brothers or sisters shall die, leaving the others surviving, then the income herein intended for the one or the other so dying shall be paid to the issue or the representative of the one or the other so dying." In an action for a construction of the will, *held*, that the design of the testator was, that the *corpus* of the estate should remain undivided in the hands of the executors until the decease of all of the brothers and sisters named; that the interests of the children of the respective brothers and sisters named did not vest in them at the death of the testator, but was future, and contingent upon surviving the parent; and that the provision was in contravention of the statute against perpetuity, and so void. *Cotton v. Fox*. 348

5. Where a testator, immediately after and in connection with, a provision in his will for certain of his children, makes a gift to his other children, speaking of them as a specified number, which is less or greater than the number in existence at the date of his will, the number will be rejected on presumption of a mistake, and all the other children will be entitled to share in the gift, unless from other portions of the will it can be inferred that all were not, and who were the particular child-

ren intended. *Kalbfeisch v. Kalbfeisch*. 354

6. K., at the time of making his will, had nine children, all of whom survived him. By his will he gave to five of his children pecuniary legacies for life, with remainder to their issue, to his daughter J. he gave certain specified real and personal property. He then, by the fifth clause of his will, gave to the remaining three children certain real estate, "subject, however, to the payment of \$113,000 to the other eight of my children," to be secured by bond, and by mortgage on the real estate devised. He devised to his son F. certain real estate, subject to the payment of \$15,000 to his executors. By the ninth clause of his will he declared it to be his intention that the said \$113,000 and \$15,000 "shall make part of the amount specifically devised to my children, and shall not be considered as additional or in excess thereof." In an action for a construction of the will, *held* (EARL, J., dissenting), that the word "eight," in the fifth clause, should be disregarded; and that, had there been no further expression of intent, the six "other children" would each take an equal share in the \$113,000 bond and mortgage; but that the express declaration of the testator's intent in the ninth clause, must govern, and this excluded his daughter J. from any share therein: First. Because the \$113,000 and the \$15,000 were alike affected, and were both to be a part of the "amount specifically devised," and J. confessedly had no claim to any part of the \$15,000. Second. Because a share in neither could be made part of an "amount specifically devised," where no money or security was given, but simply specific real and personal property; as money or securities could not become part of a piece of real estate, or of a certain chattel, and if received by the donee must be in addition thereto. *Id.*

7. The testator devised and bequeathed his residuary estate to



his nine children equally. By a codicil he authorized his executors to sell his real estate not specifically devised, and directed that the pecuniary legacies should not be paid over to the life tenants, but upon their decease, respectively, to their issue, they receiving only the income; no provision was made in the will for the payment of the testator's debts; his personal property was much more than sufficient to pay them, but the residue, with the \$113,000 and the \$15,000 added, was insufficient to pay the pecuniary legacies. *Held*, that the intent of the testator was to charge the pecuniary legacies upon the residuary real estate, and to authorize the sale thereof, if necessary to make up the sum required for their payment. *Id.*

8. The will of W. devised and bequeathed his residuary estate to his executors to convert into money, and, after paying debts, etc., to pay the remainder to his children, in equal shares; to his sons, their respective shares when they became of age, or thereafter, in such sums as the executors should deem best; and in case the whole principal should not be paid to them, or either of them, during their lives, then the residue to be "equally divided among and paid to the persons entitled thereto as their, or either of their, next of kin, according to the laws of the State of New York, and as if the same were personal property, and they, or either of them, had died intestate." By another clause, it was provided that if any of the children should die without issue, his or her share should go to the survivors. One of the sons died before his share had been fully paid, leaving a widow and one child. In an action for an interpretation of the will, *held* (MILLER, J., dissenting), that the widow was not entitled to any portion of the residue, but that the whole thereof belonged to the child. *Murdock v. Ward.* 387

9. Where the name of a person appears to an instrument purporting to be his will, and he acknowl-

edges to witnesses that it was subscribed by him, or for him, and adopted by him, it is a good subscription of the paper as a will; but in the absence of a subscription in the presence of the witnesses, there must be substantially such an acknowledgment. *Sisters of Charity v. Kelly.* 409

10. The provision of the statute of wills (2 R. S., 63, § 40), requiring a testator to subscribe "at the end of the will," means the end of the instrument as a completed whole, and where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will. *Id.*

11. John Kelly presented to two persons a paper, which he stated he had drawn as his will, and requested them to witness it. The last clause of the instrument was as follows: "I make, constitute and appoint Edward McCarthy to be executor (*J. Kelly*) of this my last will and testament, hereby revoking all former wills by me made." There was no evidence that the testator wrote the name "J. Kelly," save his statement as to drawing the will. After the two witnesses had signed, Mr. Kelly wrote his name, in the attestation clause, so that it read: "Subscribed by *John Kelly*, etc." There was no other signature. *Held*, that a refusal to admit the instrument to probate was proper; that the signature in the attestation clause was not a due execution, as it was written after the witnesses had signed their names; that the writing of the name "J. Kelly," in the last clause of the will, if written by the testator, was not a valid subscription: First. Because he did not present that name to the witnesses for their attestation, and the subsequent signing precluded the idea that he wrote it or adopted it for his signature to the paper as a will. Second. Because the place where the name appears is not the end of the will. *Id.*

## WRIT OF ERROR.

Where a judgment against the accused in a criminal action is reversed by the General Term upon a writ of error, solely upon the ground of an irregularity therein, and in the sentence; and the proceedings are remitted to the trial court to pronounce a proper sen-

tence and judgment, error will not lie to this court at the suit of the plaintiff in error below. He must await a final judgment, and for errors other than that upon which he succeeded he must seek his remedy, if any, by another writ of error. *Pratt v. People*.  
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